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Ontario

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# Decisions January 77

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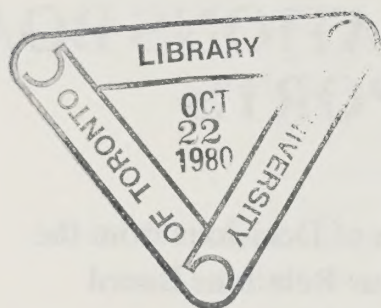


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**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1977] OLRB REP.**

Selected decisions of particular reference value are  
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**1604-76-R** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), (Applicant), v. **The Dr. George A. Morgan United Auto Workers Dental Centre**, (Respondent).

**Certification – Whether employer influence – Whether local of union may be certified as bargaining agent for union run clinic.**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

**APPEARANCES:** *Webster Cornwall for the applicant; Dr. George A. Morgan for the respondent.*

**DECISION OF THE BOARD:** January 31, 1977

1. The name “U.A.W. Dental Centre” appearing in the style of cause of this application as the name of the respondent is amended to read: “The Dr. George A. Morgan United Auto Workers Dental Centre”.

2. This is an application for certification. The applicant seeks to be certified as exclusive bargaining agent of all office and clerical employees, dental assistants and radiological technicians employed by the respondent dental centre in the City of Oshawa, except supervisory personnel.

3. A preliminary issue arises respecting the relationship between the applicant and the respondent in the light of section 12 of The Labour Relations Act. That section is as follows:

12. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

4. The facts are not in dispute. The respondent in this case is a dental clinic established and controlled by local union 222 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America for the primary purpose of providing dental services to its members and their families. While the dentists working in the clinic do so largely as independent professionals whose incomes depend principally on their individual billings, the local has managerial control of the clinic. The Centre's administrator, Dr. Morgan, works under a contract with the local, executed on its behalf by Mr. Albert Taylor, the local's president. The local may dismiss the administrator on seven days notice. The local has, through Mr. Taylor, recently hired a radiologist now employed in the centre. Whatever may be the channels of authority, the local retains ultimate control over matters of policy and over the very existence of the respondent dental centre. Local 222 is the employer.

5. The applicant is the international union of which the employer is a chartered local. The local is bound by the constitution of the international. Pursuant to the constitution the local participates in the affairs of the international and any member or officer of the



local is eligible to run for office in the international. The local provides financial support to the international by forwarding to it a portion of all dues collected. In summary, as one would expect, the local is an active participant in the financial and political affairs of the international. While it may be that the local has its own autonomy, it is in fact not independent of the international. The two are not at arm's length.

6. An arm's length relationship is fundamental to collective bargaining. Section 12 of The Labour Relations Act recognizes that the proper representation of employees demands that a union that is certified as exclusive bargaining agent be unfettered by any conflicts of interest. The division of its loyalties between the employees it represents and the employer with whom it bargains and against whom it will carry individual grievances undermines the full and fair representation to which employees are entitled. In the instant case we have no reason to doubt the good faith of the applicant. Section 12 reflects the legislative policy that so far as possible conflict of interest should be guarded against. No group of employees should be left to wonder whether an unpopular wage package was the product of a deal made between friends behind closed doors. That kind of uncertainty would invite an erosion of confidence and growing employee disaffection that would run against the grain of sound labour relations. Representation that is unequivocal and beyond question is the kind of employee representation anticipated in The Labour Relations Act.

7. The Board is of the view, in the light of the relationship between the applicant and the respondent, that the granting of a certificate in the instant case would be contrary to section 12 of The Labour Relations Act. The application is hereby dismissed.

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**1503-76-U** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.) Local 636, (Complainant), v. **Truck Engineering Limited**, (Respondent)

**S79 – Procedure – Whether Board will defer to arbitration – Whether arbitration the appropriate forum.**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members O. Hodges and J.E.C. Robinson, Q.C.

**APPEARANCES:** *Lennox A. MacLean and L. Charlick appearing for the complainant; A. P. Tarasuk and R. Harmon appearing for the respondent.*

**DECISION OF VICE-CHAIRMAN IAN C. A. SPRINGATE AND BOARD MEMBER O. HODGES:** January 17, 1977

1. This is a complaint which alleges that the respondent has violated sections 37, 42, 56 and 58 of The Labour Relations Act. It is the contention of the respondent that the matters raised in the complaint could more appropriately be dealt with through the grievance and arbitration process provided for in a collective agreement between the parties.

2. At the hearing held in this matter on December 21, 1976, the parties addressed themselves solely to the preliminary issue of whether or not the Board should refuse to entertain the complaint and defer instead to arbitration. No formal evidence was presented at the hearing, but rather the parties made their representations on the basis of certain submissions by counsel for the complainant.

3. Counsel for the complainant submitted that the complainant and respondent are parties to a collective agreement which provides for the "checking off" or withholding of union dues from employee wages by the respondent and the remitting of those dues to the complainant union. Counsel further submitted that the respondent has deducted certain sums of money from a number of employees and has failed to remit those sums to the union. Counsel filed with the Board what purports to be a letter from the respondent in the following terms:

"October 18, 1976.

Union Committee Members

– A. Sutherland

– D. Speirs

– J. Deadman

– F. Barta

– N. Hunt

SUBJECT Truck Engineering Limited  
– Illegal Work Stoppage  
October 14, 1976

In accordance with Article 7 (d) of our current Agreement with Truck Engineering Limited unit of the U.A.W. Local 636, it is our intention to claim damages for losses incurred on October 14th and for succeeding losses incurred as a result of the work stoppage on October 14th.

Damages are estimated to amount to \$26,740.

Dues normally deducted and submitted to the Union Treasury on a monthly basis will be deducted as per usual and held by the Company until the above damage claim has been paid.

Sincerely yours,

(SGD.) R. E. Harmon  
R. E. Harmon  
Personnel Manager.

c.c. L. Charlick  
International Representative  
(registered)"

4. Counsel for the respondent contended that the issue in dispute between the parties was essentially one of interpreting the respective rights of the parties under article 7(d) of the aforementioned collective agreement. Article 7(d) appears to set out certain rights which accrue to the respondent upon a violation of the collective agreement's no strike provision. We feel it is safe to say that it is not the type of article which is included in most collective agreements.

5. The Board's general practice where an alleged unfair labour practice also constitutes at the same time an alleged breach of a collective agreement has been to exercise its discretion under section 79 of the Act and defer the matter to grievance arbitration. (See: *Collingwood Shipyards* [1967] OLRB REP. July 376 and *Sunnybrook Food Market (Keele) Ltd.* [1972] OLRB REP. March 210). The Board has, however, always recognized that exceptions must exist to this general policy. A number of such exceptions are referred to in the Board's decision in *The Corporation of the County of Middlesex* [1976] OLRB REP. Aug. 427.

6. We do not feel that as a general practice the Board should depart from its general policy of deferring to grievance arbitration. Indeed we are concerned that should the Board not retain this policy, parties might, in certain instances, seek to characterize issues which relate primarily to the interpretation, application or alleged violation of collective agreements as being violations of the Act so as to allow them to bring such issues before this Board rather than before boards of arbitration. It is clear from a reading of section 37 of the Act that issues which arise out of the interpretation, administration or alleged violation of a particular collective agreement should, as a general matter, be determined by a board of arbitration established pursuant to the collective agreement itself. It should be noted that where the Legislature sought to alter this situation so as to have this Board rule on grievances arising out of the interpretation, application, administration or alleged violation of collective agreements negotiated in the construction industry, it did so by specifically amending the Act through the addition of section 112a.

7. Having set out our views with respect to the general issue of the Board deferring to arbitration, we now turn to the matter before us. After careful consideration we have concluded that the facts as alleged by the complainant raise a number of issues which may go beyond the interpretation, application or alleged violation of this particular collective agreement. This being the case, we have determined that this matter should be listed for a hearing on the merits of the complaint. When the parties re-attend before the Board we would ask that they be prepared to make submissions on the following question, namely, if it is assumed that the alleged actions of the respondent as set out above are in fact supported by the terms of Article 7(d) of the collective agreement, is the carrying out of those actions nevertheless a violation of The Labour Relations Act?

8. This matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER J.E.C. ROBINSON, Q.C."**

I have had an opportunity of perusing the decision of the majority.



While I am in general agreement with the jurisprudence cited by the majority in its decision, I would have deferred to arbitration on the basis of the allegations in this case.

I would so find.

*"J.E.C. Robinson, Q.C."*  
January 17, 1977.

**0641-75-R** United Cement, Lime, & Gypsum Workers; International Union and its Local 219, (Applicant), v. **Canada Cement Lafarge Ltd. and Point Anne Quarry Company**, a division of Standard Industries Limited, (Respondents), v. Christian Labour Association of Canada, (Intervener).

Sale of a Business – Successor Status – Related Employer – Evidence – Procedure – Effect of onus on Respondent to adduce material facts – Whether Board will require further evidence.

**BEFORE:** T. E. Armstrong, Q.C., Chairman, and Board Members L. Hemsworth and H. Simon.

**APPEARANCES AT THE HEARING:** *B. A. Dunn, D. G. Burshaw and E. Batten for the applicant; no one for the respondent Canada Cement Lafarge Ltd; R. Statton, C. Moyer, W. Griffiths and J. Wray for the respondent Point Anne Quarry Company, a division of Standard Industries Limited; W. R. Herridge, Q.C., and J. Adema for the intervener.*

**DECISION OF T.E. ARMSTRONG Q.C. CHAIRMAN; AND BOARD MEMBER L. HEMSWORTH:** October 28, 1975

1. This is an application by United Cement, Lime & Gypsum Workers' International Union and its Local 219 under section 55 of *The Labour Relations Act* in which the applicant alleges that a sale of a business has occurred between Canada Cement Lafarge Ltd. (hereinafter referred to as "C.C.L.") and Point Anne Quarry Company, a division of Standard Industries Limited (hereinafter referred to as "Standard"). The applicant also asks, apparently in the alternative, that the Board treat C.C.L. and Standard as one employer pursuant to the provisions of section 1(4) of the Act.

2. For the purposes of this interim decision, it is necessary only to refer to the highlights of the evidence. For approximately thirty years prior to 1974, the applicant and C.C.L. were parties to successive collective agreements covering the employees of C.C.L. at Point Anne, Ontario. During those years, C.C.L. operated a cement manufacturing plant at Point Anne. Part of its operation included a quarry, where limestone was mined and reduced to aggregate for use solely in the manufacture of the company's Portland cement.

3. In late 1973, C.C.L. ceased operating its plant at Point Anne. At about the same time, it acquired the large property at Bath, Ontario, and, shortly thereafter started up a similar operation at its new location. The applicant was recognized as the bargaining agent

at the new site, and a collective agreement was concluded covering the employees of the Bath operation.

4. In the instant application, the applicant seeks bargaining rights for employees of "Point Anne Quarry Company, a Division of Standard Industries Ltd." Considerable evidence was adduced concerning Standard's operation at Point Anne, including the manner in which the operation at Point Anne, including the manner in which the operation at that site came into being, the corporate organization and structure of Standard, and its relationship to C.C.L. The evidence establishes that in January 1974, Standard commenced negotiations with C.C.L. for the use of the Point Anne property. The negotiations culminated in what was referred to as a "royalty" agreement between Standard and C.C.L. The agreement, which runs for thirty years, with a five-year extension option, permits Standard to occupy the property, extract limestone, and produce construction aggregate for retail sale.

5. The evidence disclosed that C.C.L. entered into a separate agreement with a demolition company called Standard Machinery Equipment Limited (hereinafter referred to as "S.M.E.") whereby S.M.E. acquired the right to the plant and equipment of C.C.L. at Point Anne, for demolition or sale. Standard, we were told, commenced the production of aggregate on the Point Anne site in late 1974, and, over the intervening months, acquired from S.M.E. some of the plant and equipment formerly owned and operated by C.C.L. in the mining of limestone and the production of aggregate for its cement plant. Much of the equipment so acquired is now used by Standard in its operation on the Point Anne site; some of the equipment was acquired and moved by Standard to other production facilities.

6. In December 1974, the intervener, Christian Labour Association of Canada, was certified by this Board as the bargaining agent for a defined unit of employees of Standard. Subsequently, in January 1975, Standard and the intervener entered into a two-year collective agreement covering Standard's employees at Point Anne. The applicant contends that the intervener's collective agreement is null and void and asked that it be set aside and that the Board declare that the applicant holds the bargaining rights. This relief is sought in two separate applications, both of which came before us for hearing on August 8.

7. In Board File 0640-75-R, the applicant asks that it be certified, contending that the Board should reconsider its decision certifying the intervener, revoke the certificate issued to the intervener on December 12, 1974, in Board File 6941-74-R, and set aside the collective agreement negotiated pursuant to that certificate. In Board File 0640-75-R, the applicant alleged fraud on the part of the intervener and Standard in the certification proceedings leading to the certificate of December 12, 1974. The applicant's essential allegation was that neither the intervener nor Standard disclosed the applicant's interest pertinent information concerning the applicant's bargaining right from the Board. Standard and the intervener, in turn, contended that the applicant's allegations of fraud were not supported by timely particulars, in accordance with section 47 of the Board's Rules of Procedure, and asked that the application be dismissed. The Board reserved on the motion and, in so doing, expressed reservations about the right of this panel to reconsider the decision of another panel of the Board. At the same time, we indicated that we proposed to proceed with the application brought pursuant to section 55 of the Act, Board File 0641-75-R, wherein, as previously indicated, the applicant contends, in the alternative:

- a) that Standard is the successor employer to C.C.L. at Point Anne;
- and

- b) that Standard and C.C.L. should be treated as one employer pursuant to section 1(4) of the Act.

8. Upon the completion of Mr. Moyer's testimony, counsel for both the intervener and the applicant stated that they did not propose to call evidence. Counsel for the applicant, however, argued that the respondent had failed to fully fulfil its obligations under sections 1(5) and 55(13) of the Act and asked that the Board issue the appropriate direction to the respondent requiring it to rectify what counsel referred to as deficiencies in its evidence. The additional information sought in the motion is set out in paragraph 17 below.

9. This is one of the first applications heard by the Board in which sections 55 and 1(4) have been invoked since the enactment of Bill 111, an Act to amend *The Labour Relations Act*. The amendments material to this application relate to the obligation of the employer concerned to adduce at the hearing all the facts within its knowledge material to the issues in dispute. The wording of the relevant sections is as follows:

#### Section 1(5)

"Where, in an application made pursuant to subsection 4, it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation."

#### Section 55(13)

"Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation."

10. It is difficult, and perhaps undesirable, to attempt an exhaustive formulation of a respondent's obligation under these new sections. Much will depend upon the circumstances of each particular case. However, it may be useful to make some general observations on what we conceive to be their effect.

11. Prior to the enactment of sections 1(5) and 55(13), certain threshold evidentiary difficulties faced an applicant attempting to invoke section 1(4) or section 55. For example, the issue under section 1(4), as to whether corporations carrying on related or associated activities or businesses should be treated as one employer, is dependent upon facts which lie peculiarly within the knowledge of the corporations concerned. The same is true where the sale of a business is alleged under section 55. Since the ultimate burden of proof lies with the applicant in such cases, it was necessary, prior to the amendments, for the applicant to subpoena officers or employees of the respondents in an attempt to prove its case. Failure to call any evidence was fatal to the applicant's case: see *Super City Discount Foods Limited*, O.L.R.B. Monthly Reports, August 1969, p. 666. Thus, the applicant was in an anomalous position of having to rely upon evidence of persons adverse to the interest which it was asserting. Moreover, in determining how to proceed, the applicant faced several difficult deci-



sions: who amongst a corporation's various officers or representatives was in the best position to testify fully and accurately on all material aspects of the relationship or transaction in question; what documents, if any, should be subpoenaed; how could the subpoena for documents be cast in sufficiently broad terms to cover the appropriate material without it being struck out for lack of particularity? At the hearing, since the respondent's officers were the applicant's own witnesses, the applicant could not probe their testimony in the usual manner by cross-examination. Frequently, therefore, the applicant was left with evidence from a vague, reticent or ill-informed witness – a witness who, at least technically, was his own.

12. It is, we think, reasonable to assume that these and related problems gave rise to the enactment of sections 1(5) and 55(13). As we construe the amendments, the onus of adducing the material facts has now been placed upon the parties having knowledge of, and access to, those facts. What does this mean in practical terms? A basic question, and one raised directly by Mr. Dunn's motion, is: what is meant by *all* material facts? Construed literally, it could, as Mr. Dunn contends, mean all facts conceivably bearing upon the particular issue in dispute. If that was the Legislature's intention, a respondent's ability to comply would ultimately depend upon the ingenuity and speculative talent of the applicant's counsel. Hypothetically, a series of questions could be devised, the answers to which could conceivably be material. A witness' inability to answer such inquiries could then give rise to repetitive and, in theory, endless assertions that the respondent was failing to fulfil its statutory obligation.

13. In our view, the amendments are not intended to permit an applicant to engage in a fishing expedition of a sort suggested by that hypothesis. Where relief under section 1(4) and/or section 55 is claimed, we believe that the respondent's obligation, must be sensibly delimited. In defining the obligation, some assistance is obtained by looking to Court practice in examinations for discovery in civil actions. Clearly, the analogy is not perfect or complete: the purpose of pre-trial discovery in a civil suit is quite different, as is the rationale for restricting the ambit and nature of questioning on discovery. However, the analogy is instructive, especially where there are corporate parties, for the limited purpose of indicating who should be produced, the extent to which the person produced should prepare himself to testify, and the remedies, should the witness fail to supply information properly requested from him.

14. On an examination for discovery, the person being examined is bound to make reasonable efforts to inform himself of all matters material to the issue in question. In the case of a corporate officer, this entails acquainting himself of facts not within his personal knowledge which are within the knowledge of other officers, servants or agents of the corporation or which form part of the records of the corporation: *Bondar v. Usinovitch*, [1918] 1 W.W.R. 557 (Sask.); *Geddings v. C.N.R.*, (1919) 1 W.W.R. 909 (Sask. C.A.); *Star Electric Fixtures Ltd. v. Sussex Fire Insurance Co.*, [1936] O.W.N. 654 (S.C.); and, generally, *Homestead & Gale, Ontario Judicature Act and Rules of Practice*, vol. 2, p. 134.

Similarly, a party giving discovery is under duty to make a careful and diligent search of all relevant documents in his possession and to make diligent inquiries about all material documents which may be in the possession of others for him: *Price v. Price*, (1879), 48 C.J. Ct. 215.

Under the Supreme Court Rules of Practice, a corporate witness may be ordered to inform himself concerning questions properly put to him which he is unable to answer. The court also has the power to grant leave to examine a second officer if the witness has failed to give to the party seeking it the information to which it is entitled.

15. We believe that similar principles and procedures should apply under sections 1(5) and 55(13). The obligation to adduce material facts is upon the respondent, and the witness or witnesses chosen by it should tender their evidence-in-chief. Except in exceptional circumstances (e.g., where the respondent is unrepresented), we do not believe that it is desirable for the Board to conduct the inquiry. Nothing in the recent amendments causes us to disagree with the observation of the Board in the *Super City Discount Foods* case, *supra*, that "It is not for the Board . . . to undertake an inquiry of its own in the matter." There may be situations where members of the panel may wish to question witnesses to have testimony clarified or amplified. However, generally speaking, it is desirable that the carriage of the proceedings be left to the parties.

16. Once the respondent has completed its evidence, the applicant may wish to contend that the initial obligation to adduce all material facts has not been met. In such cases, an applicant may, at that stage, ask the Board to direct compliance. In most instances, however, it would seem to us that the applicant should proceed with its cross-examination. If, in cross-examination, the witness is unable, or unwilling, to respond to questioning, and if the applicant can persuade the Board that the answer sought is likely to be material to the issues in dispute, the applicant is entitled to seek a direction from the Board requiring that the information be supplied, either by the witness informing himself or by the respondent producing the information through another witness. If the applicant completes its cross-examination without objection to the testimony given, it is reasonable to assume that it is content to accept the testimony of the particular witness as tendered. And when the respondent completes its evidence, and the case proceeds without objection from the applicant, the reasonable conclusion is that the applicant has waived any right to contend that the respondent has not fulfilled the obligation created by section 1(5) or section 55(13), as the case may be. It may be noted that there is nothing to prevent an applicant from calling evidence to add to, vary or contradict the testimony of the respondent's witnesses.

17. The particular information sought by the applicant in its motion, as set out in the applicant's written submissions, is as follows:

- “(i) The shareholdings in Standard Industries Limited of the directors who are common to both respondent companies at the time the alleged sale occurred;
- (ii) The specific shareholdings of Canada Cement in Standard Industries Limited at the time the alleged sale occurred. The filing of an Annual Report dated March 31, 1975 does not tell the Board the material fact as that Report speaks of a holding of ‘approximately 49%’ and whether that is as of the date of the Report or some other date is not clear.
- (iii) Minutes of directors’ and shareholders’ meetings and any internal memoranda or documents related to the establishment of a business by the respondent at the Point Anne site, whether or not Canada Cement



is referred to in such material, as the respondent must adduce the facts material to the positive and negative side of the issues raised.

- (iv) All written documents including contracts and bills of sale relating to property and chattels acquired from whatever source in which Canada Cement formerly had an interest.
- (v) The production of the whole of the agreement between Canada Cement and Standard Machinery with respect to the acquisition of equipment and demolition."

18. A preliminary consideration is whether the applicant was entitled to make its motion after all parties had concluded their evidence. As we have indicated, we believe that the proper time to make such a motion is when the respondent has completed its evidence-in-chief and before any further steps are taken in the proceedings. Otherwise, if the motion is granted and further testimony given, the proceedings could, in theory, be prolonged indefinitely, with other parties seeking to reopen their cases to meet any additional facts adduced pursuant to the Board's direction. Were it not for the fact that the amendments raise novel questions of procedure and that the Board's practice was not enunciated at the time of the original hearing, we would have found that the applicant's motion was untimely and that it had waived its right to seek to have the respondent adduce further facts. However, since this is a case of first impression, we are not prepared to deny the applicant's motion on that technical ground.

19. The substantive problem raised by the motion is whether the inability of the respondent's witness to supply the information requested constitutes failure to adduce all material facts concerning the allegation. In determining that issue, we must be satisfied that there is a real likelihood that the questions, if answered, will produce evidence having probative value, either by affirming or negating the allegation made. When an allegation is made under section 1(4), it is clear that one of the material considerations will be the extent to which the corporations in question are related through common directorships and share control. Mr. Moyer was able to identify common directors. His evidence relating to the shareholdings of the common directors and the specific shareholdings of C.C.L. in Standard was unsatisfactory. While there is nothing to suggest any intention to deliberately conceal these material facts from the Board, we are of the view that they must be supplied in order that the respondent fulfil its statutory obligation under section 1(5) and 55(13).

20. We have reached the same conclusion concerning the request for the minutes of directors' meetings related to the establishment of a business by the respondent at the Point Anne site. This material was requested by the applicant at the hearing and Mr. Moyer replied that he was not a member of the board of directors and, accordingly, had no knowledge of the contents of the minutes requested. He should inform himself of this information and if there were directors' meetings at which the matter was discussed, the minutes of those meetings should be produced. To return to the discovery and careful inquiries concerning material or information relating to the issues in dispute which may be in the possession of others in the corporation.

21. The remainder of the applicant's motion is dismissed. In order for the Board to intervene, the applicant must have requested and failed to obtain the information in its



cross-examination of the witness. Our notes indicate that the witness was not asked to produce the minutes of shareholders' meetings, nor was a general request made for documents in the terms of item (iv), paragraph 17 *supra*.

22. As to the request for the production of the whole of the agreement between C.C.L. and S.M.E., it is to be noted that the requirements under sections 1(5) and 55(13) relate to facts within the respondent's knowledge. The respondent Standard is not a party to the agreement between C.C.L. and S.M.E. and the witness Moyer testified that he had obtained and produced the only excerpts of the agreement in Standard's possession. Moreover, he stated that so far as he was able to determine, these extracts were the only portions of the agreement pertinent to Standard's interests. We do not agree with the applicant's contention that in preparing to meet its obligation to adduce material facts the respondent must obtain information, by subpoena or otherwise, to which it has no legal right and in which it has no apparent interest. If upon learning of the document the applicant wished to have it produced in its entirety, it could have requested an adjournment to enable it to subpoena the document. No such request was made.

23. Finally, we must consider the applicant's additional request that it be permitted to reopen its case and call evidence of its own. For the reasons indicated, we have entertained the applicant's request that the respondent supply further material facts on the ground that the procedures in matters of this sort were undeveloped at the time the motion was made. However, we are of the view that there is no justification for permitting the applicant to reopen its case simply because its motion has been partially rejected. We have reviewed our notes with great care and there is no doubt that prior to making the motion the applicant stated without reservation that it had no evidence to call. That decision was not expressed to be contingent upon our disposition of the request. In considering the request, we have weighed the desirability of having all relevant evidence before us, against the necessity to be fair to all parties and to bring some finality to the proceedings. Having carefully balanced these considerations, the request of the applicant for permission to reopen its case is denied.

24. We direct the respondent, Standard, to adduce through a witness, the following additional material facts:

- 1) the shareholdings in Standard of the directors who are common to both Standard and C.C.L. at the time the alleged sale occurred;
- 2) the specific shareholdings of C.C.L. in Standard at the time the alleged sale occurred; and
- 3) any minutes of the directors' meetings of Standard at which reference is made to the establishment of a business by Standard at the Point Anne Site.

25. The Registrar is directed to relist the matter for hearing. Evidence will be limited to the material directed to be produced in the preceding paragraph, including, of course, cross-examination thereon.

**DECISION OF BOARD MEMBER H. SIMON:**

This is one of the first applications filed under sections 55 and 1(4) under *The Labour Relations Act*, as recently amended on July 18, 1975, placing the onus on a respondent to adduce all facts within its knowledge relevant to the applicant's allegations. In this case, the United Cement, Lime & Gypsum Workers International Union and its Local 219 alleged that a sale of a business has occurred between Canada Cement Lafarge Ltd. and Point Anne Quarry Company, a division of Standard Industries Limited. In my view, the respondent has failed to discharge the obligation to adduce all relevant material, as contemplated by the amendments to the Act. Furthermore, Canada Cement Lafarge Ltd., one of the respondents named by the applicant, failed to attend the hearing scheduled in this matter, thereby placing the applicant at a serious disadvantage. In view of the foregoing, and having regard to the nature of the evidence as adduced at the hearing, I would have permitted, as well, the applicant to adduce evidence at the next hearing to substantiate its charges.

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**1255-76-R** Christian Labour Association of Canada, (Applicant), v. **Chateau Gardens (London) Inc.**, (Respondent), v. London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Intervener).

- and -

**1329-76-R** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant), v. Chateau Gardens (London) Inc., (Respondent), v. Christian Labour Association of Canada, (Intervener).

**Representation Vote – Charges – Timeliness – Effect of allegations of misconduct during the silent period being filed after vote counted and result known – Whether timely.**

**BEFORE:** D.H. Kates, Vice-Chairman and Board Members E. Boyer and H.J.F. Ade.

**APPEARANCES:** *Wm. Herridge, Q.C., Ed Grootenboer and Ed Vanderkloet for the Christian Labour Association of Canada, Ted Wohl and Al Campbell for London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C.*

**DECISION OF THE BOARD:** January 28, 1977.

1. In its decision dated November 25, 1976 the Board directed the taking of a representation vote in this matter. The representation vote was conducted on Thursday, December 23rd, 1976. The applicant, Christian Labour Association of Canada (hereinafter referred to as "the CLAC"), within the time period permitted in the Board's Rules on Practice and Procedure, filed representations with respect to the Returning Officer's Report. More particularly, the CLAC alleges that the intervener, Local 220, S.E.I.U. (hereinafter referred to as "Local 220"), breached the Registrar's direction in continuing its electioneering during the course of "the silent period." The request is made that the Board give no effect to the Returning Officer's Report but direct a second representation vote.

2. During the course of the hearing in this matter witnesses called to adduce evidence on behalf of the two competing trade unions gave diametrically opposed evidence

with respect to whether Local 220 had violated the silent period. On the one hand CLAC asserts that on Friday December 17th, 1976, Mr. Campbell, Local 220's business agent, distributed pamphlets to employees as they entered and left the premises. These pamphlets were left in the staff lounge reserved for employees' use during their lunch and break times. Copies were also posted on numerous bulletin boards throughout the respondent's premises where, it was conceded, they would easily come to the attention of interested employees. The witnesses called to the stand on behalf of Local 220 agreed that the electioneering did, in fact, occur as described. Nonetheless, Mr. Campbell advised that the persons to whom some of the pamphlets were given for distribution were informed that they were to be removed before the onset of the silent period.

3. The silent period commenced, in accordance with the Registrar's direction, at midnight on Sunday December 19th, 1976. Miss Harkness indicated that she was scheduled to work on that evening and attested from her personal observations that no propaganda of any kind was left on the premises during the period under deliberation. Miss Harkness was clearly confused in the giving of her testimony regarding her observations with respect to propaganda distributed on a previous occasion but that had been removed on instructions from Local 220. Apparently an initial vote was scheduled but for reasons never explained to the Board was cancelled and scheduled for another date. Nevertheless it was Miss Harkness' clear recollection, although she did not play any part in the removal of the impugned propaganda, that no S.E.I.U. pamphlets remained on the respondent's premises during the course of the silent period directed with respect to the second vote. Miss Harkness is employed as a nurse's aide at the respondent's home and is assigned from time to time, to various sections of the premises. She admitted to acting on behalf of Local 220 in its attempts to persuade employees to support its cause.

4. Mrs. M.B. Sandford is assigned to the laundry section of the respondent's premises. She supported the CLAC in its cause to win the support of the employees. She was appointed by the CLAC as scrutineer on its behalf at the time of the taking of the representation vote. She stated that from the onset of the silent period to the holding of the vote that the pamphlets distributed by Local 220 remained on the bulletin boards spread throughout the respondent's premises, particularly in the staff Lounge. When questioned as to how she became aware of this she indicated that she was instructed to remove the CLAC material from the premises. During the course of her efforts to do so she noted that Local 220 propaganda remained on the premises. More particularly, in many instances the CLAC material was posted alongside the Local 220 pamphlets. During the course of performing her duties, she noticed that the pamphlets had not been removed. As events subsequently evolved it was apparent that she made no disclosure of this shortcoming to the CLAC business agent assigned to the campaign.

5. In due course the representation vote proceeded at the times scheduled by the Board's Notice. At the end of the vote the ballots were counted and Local 220 was shown to have decisively won the allegiance of the respondent's employees.

6. The scrutineers certified that the Board's conduct of the vote was without complaint. At 4.40 p.m. on the afternoon of Thursday, December 23rd, Mr. Grootenboer, a business agent employed by the CLAC, arrived on the premises. He testified that he arrived late for the conduct of the vote but nonetheless at that time learned the result. He noticed that Local 220 pamphlets were posted on bulletin boards at two locations about the premises.



es. He also attested that he procured a handful of pamphlets from the staff lounge which he subsequently showed to Mrs. Sandford. Mrs. Sandford agreed that Mr. Grootenboer was upset with the state of affairs as described to her but she could only recall seeing just one pamphlet in his possession. In any event Mrs. Sandford, after learning of Mr. Grootenboer's concerns, advised the Returning Officer, in Mr. Campbell's presence, that it was the CLAC's intention to challenge the vote. Mr. Campbell was taken back by this state of developments. Mr. Grootenboer at no time spoke to the Returning Officer or personally confronted Mr. Campbell. On December 24th the allegations were filed with the Board.

7. There is an obvious contradiction in the testimony given by both parties to this dispute which, if necessary, would have to be resolved by the weight of the evidence and the credibility attached to the witnesses. Notwithstanding the conflict recited herein the Board wishes to express another concern which may be dispositive of the issues before us. If we are to assume, but without finding that the CLAC's version of the events are to be preferred, then in our view its delay in filing notification of the S.E.I.U.'s wrongdoing was inexcusable. The Board learned from Mrs. Sandford that she discovered the shortcoming of S.E.I.U.'s adherence to "the silent period" immediately at its outset. She knew that electioneering material had to be removed from the employer's premises because she was charged with that responsibility with respect to the CLAC's material. She was charged with other responsibilities on behalf of the CLAC's efforts inclusive of the role of scrutineer of the vote. At no time did it appear that she advised the CLAC's representative of the continued wrong-doing during the 72-hour period prior to the taking of the vote. Yet at all material times Mrs. Sandford was acting under instruction and direction from the CLAC's representatives. We have no misgiving in ruling that notwithstanding Mrs. Sandford's apparent ignorance of the implications of the breach of the silent period until the arrival of Mr. Grootenboer on the scene, she nonetheless was acting as the CLAC agent responsible for overseeing the CLAC's interests in the conduct of the vote. Indeed, she is shown to have signed her name to the Board's *Certificate of Conduct of Election*.

8. The Board finds that the CLAC was under a duty to exercise some dispatch in the filing of its charges once it became known that another party to the dispute was in breach of the Registrar's direction. The Board is of the view that the purpose of the imposition of the silent period is to prevent any one party from gaining an unfair advantage with respect to electioneering. If the circumstances described to the Board in the CLAC's evidence was true and had due diligence with respect to the wrongdoings been exercised then adjustments could have been made to correct the alleged shortcoming. In other words, it does not lie in the mouth of a party to exploit to its own advantage a rule that was designed to assure fairness in the conduct of the vote. We find that a party cannot "lie in the bushes" and await the outcome of a vote and when it learns that the result was not amenable to its liking seek a second representation vote on the basis of a breach of a rule that could have been brought to the Board's attention in advance of the taking of the vote. (See: *R: Pure Spring (Canada) Ltd. et al* case, an unreported decision of The High Court per King J., dated February 21, 1965.)

9. In the normal circumstances, had due diligence been exercised in the filing of the allegations the Board may very well have directed that the ballot box be sealed pending the disposition of the evidence filed in support of the charges. Or, the Board may very well have dispatched a Labour Relations Officer to investigate the respondent's premises and upon those findings the Board may very well have cancelled the holding of the vote and sched-

uled it for another day to permit the prejudiced party to recoup what lost advantage had accrued as a result of the impugned electioneering. Whatever the adjustments that could have been made prior to the holding of the vote we are satisfied that the CLAC's conduct in delaying the filing of the charges until after an unhappy result was known deprived the Board of any such opportunity. The Board is confident that our rules were not designed to allow a party in these circumstances to have "two bites of the cherry" where one may have sufficed. As a result the Board is satisfied having regard to all of the evidence and the ensuing concerns with respect to continued viable collective bargaining that the CLAC ought to be foreclosed from filing its objections. (See: *Lecours Lumber Company Ltd.* case, [1972] OLRB Rep. November 982.)

10. The Board finds that the voting constituency in paragraph 4 of our initial decision is a bargaining unit appropriate for collective bargaining.

11. The Board further finds, having regard to the Returning Officer's Report, that Local 220 of The Service Employees International Union is the appropriate bargaining agent for employees engaged by the respondent in the appropriate bargaining unit.

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### **1253-76-R Canadian Union of Public Employees, (Applicant), v. The Regional Municipality of Halton, (Respondent).**

**Certification – Representation Vote – Effect of misconduct during silent period – Whether new vote must be ordered.**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

**APPEARANCES:** *Helen Browne and Dr. Mario Hinkl for the applicant; Keith Billings, D. M. Camm and Stanley Allen for the respondent.*

#### **DECISION OF THE BOARD, January 21, 1977**

1. This is an application for certification wherein the applicant requested a pre-hearing vote. The vote was ordered by the Board on November 8, 1976, and duly held on November 25, 1976. Following the Board's usual practice the parties were directed to refrain from propaganda and electioneering from midnight of Sunday, November 21, 1976 until the taking of the vote. The respondent alleged a breach of the above "silent period" by the applicant and the Board convened a hearing on that issue at the respondent's request.

2. The evidence establishes that members of the bargaining unit received campaign literature in the form of a letter from Mrs. Helen Browne, the National Representative of the applicant, on Monday, November 22, 1976. Mrs. Browne testified that she wrote the letter in question out of a felt need to reply to a written communique from the respondent to the employees on the subject of this application. She believed the employer's communique to have been delivered to the employees by hand on November 16, 1976, although the respondent's evidence was that it had merely been mailed out on that date. She testified that

she drafted her reply letter to the voters on November 17, 1976, and instructed her secretary to have it in the mail by 11:00 a.m. the next day. She says that this was done and that she felt secure that the letters would reach the voters prior to the onset of the silent period as a result of assurances which she received personally from the postmaster at the Don Mills Postal Station on the morning of December 18, 1976. In fact, the postmark on the envelopes in which the campaign letters were sent is dated November 19, 1976. That date was stamped by a postal meter in the applicant's own offices.

3. The applicant asks this Board to find that the letters were in fact sent on November 18, 1976, in circumstances that establish that all reasonable precautions were taken by the applicant to safeguard against a breach of the silent period. The respondent urges the view that the letter was in fact drafted on November 18, 1976, in response to its own letter that would have been received by the voters on November 17, 1976, and that Mrs. Browne's letter was in fact mailed on November 19, 1976.

4. We note that the Board was presented with no direct evidence from Mrs. Browne's secretary respecting the mailing of the letters and that her own testimony on that point is hearsay at best. There was considerable conflict in the evidence as to the dates upon which this event and those leading up to it occurred. The recall of times and dates is frequently prone to be unreliable in *viva voce* testimony that is given several weeks after the fact. In the instant case the Board prefers to rely on the applicant's own postmark as the best evidence of when the letters were mailed.

5. However strongly motivated the well-intentioned Mrs. Browne might have been, the applicant acted at its peril by posting the letters on November 19, 1976. It did not thereby exercise such reasonable precaution as might have tended to avoid a breach of the silent period. (See *Windsor Telephone Answering Service* [1973] OLRB Rep. Sept. 460).

6. As a result the vote taken is hereby nullified and the Registrar is instructed to conduct a second representation vote in the two voting constituencies, in the same manner as described in the Board's Order dated November 8, 1976.

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**0901-76-U** Local 550, Canadian Food and Allied Workers Chartered by the Amalgamated Meat Cutters and Butcher Workmen, (Complainant), v. **Culverhouse Foods Incorporated**, (Respondent) .

**S79** – Effect of newly created closely related company supplying employees to employer – Effect of refusal by related company to rehire employees because of their union membership – Whether employer unfair practice.

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members O. Hodges and W. H. Wightman.

**APPEARANCES:** G. Charney, I. Dawson and Julius Hoebink for the complainant; M. Joseph Haffey, Q.C. for the respondent.



**DECISION OF THE BOARD: January 21, 1977**

1. This is a complaint under section 79 of The Labour Relations Act, which alleges that Wayne C. Bailey, William Boyd, Lloyd D. Brown, Harry Deputowyth, Frank Hines and Frank Sider were dealt with contrary to sections 56, 58(a), 58(b) and 61 of the Act. The complainant alleges that the respondent refused to continue to employ or to hire the above named grievors for reasons of anti-union sentiment.

2. Two preliminary matters were raised by the respondent. Firstly, counsel for the respondent requested that the Board provide a court reporter to take a verbatim transcript of the proceedings. That request was denied. This Tribunal is not a court and was not intended to possess all of the facilities of a court. One of the purposes of The Labour Relations Act is to allow for a specialized form of adjudication in a forum free of the formalities that are appropriate to a court. Nothing, however, would prevent a party from taking a verbatim transcript of the proceedings through its own stenographer or reporter, and it has been the consistent practice of the Board to allow the parties who so wish, to do so.

3. Secondly, at the outset of the hearing, counsel for the respondent advised the Board that an application under section 55 of the Act was ongoing before another panel of the Board. (Board File No. 0636-76-R, subsequently decided November 23, 1976). The applicant union in that case sought a declaration that the respondent is bound by a collective agreement between the applicant and Culverhouse Foods Limited on the grounds the respondent purchased a business from Culverhouse Foods Limited. Counsel for the respondent requested that the hearing of the instant complaint be adjourned pending the outcome of the section 55 application.

4. While neither of the parties suggested a consolidation of the two proceedings pursuant to section 56 of the Board's Rules of Procedure, the Board itself raised that possibility. Since another panel was seized of the section 55 application and had commenced to hear evidence in it the Board noted that consolidation was impracticable.

5. Counsel for the complainant argued against adjournment on the basis that there is no critical relationship between the section 55 application and the instant complaint. He stated that the union intended to prove facts which would establish that the respondent, whether or not it was a "successor employer", had breached the Act to the prejudice of the grievors.

6. The request for an adjournment was denied. We agree with counsel for the complainant union that the issues in the two proceedings are distinct and that no good purpose would be served by adjourning these proceedings. In this regard we note that the respondent did not urge the Board to await the outcome of the prior application in order to defer the issues in these proceedings to arbitration in the event of the success of that application. Moreover, the failure of the section 55 application would not materially change the case that the complainant seeks to make. It would rely on the same acts of the respondent to make out a breach of the Act. In these circumstances there is no apparent prejudice to the respondent.

7. We turn now to the facts. In May of 1976 the respondent purchased from Culverhouse Foods Limited the produce canning plant in which the grievors were employed. At

that time two kinds of workers were employed in the plant: seasonal workers, called in as required when various fruits or vegetables became ripe for canning, and permanent employees, all but two of whom are the grievors. The permanent workers were not always laid off at the conclusion of each canning season, but were often kept on to do shipping as well as painting and other odd jobs in and around the plant. The permanent workers were, at the time of the purchase, the only employees in the plant represented by a union.

8. In the weeks prior to the sale of the plant rumours about a possible sale circulated among the employees. The Board accepts the evidence of the grievors that Ron Nevard, then a shipping foreman with Culverhouse Foods Limited and subsequently employed in that capacity by the respondent, made a number of statements to certain of the grievors to the effect that their union membership would be a detriment to them in the event of a sale of the plant to the respondent and that they should therefore divest themselves of such membership.

9. Except for Mr. Boyd, then away, and a probationary permanent employee who was not a union member, all of the permanent employees were laid off on or near May 28th, 1976 and told that they would be recalled. None have been, notwithstanding that the plant has operated in all material respects as it had in the past. The work formerly done by the grievors has been and is being performed by new employees.

10. We accept the evidence of Mr. Deputowyth that upon seeking to be recalled he was told by Mr. Cudney, President and owner of the respondent, that he could return to work if he would agree to work for Mr. Cudney in Toronto for a couple of weeks after which time, according to Mr. Cudney, he would cease to be represented by the union and so could return to the plant.

11. Mr. Boyd, who had been employed in the plant as a cook prior to the sale, was on leave on an overseas trip during the transfer of the plant. We accept his evidence that when he returned in June and went to the plant to inquire as to when he could return to work he was told by Ken Gartrell, a fieldman and foreman of the respondent, that he would be a better candidate for recall if he were not a member of the union. He was told later that day by Mr. Borden Roberts, the respondent's Plant Production Manager, and Mr. Robert Marran that he would be recalled in a couple of weeks. A week later Mr. Marran told him by telephone that he would not be recalled.

12. In early June the grievors Brown and Hines attended at the plant with the business representative of the local union and the international representative of the complainant in an attempt to serve formal grievances made under the collective agreement upon the respondent. The respondent refused to accept the grievances. Before this Board the respondent took a three-fold position to explain its refusal.

13. Firstly, it asserted that it was not bound by the collective agreement because it was not a successor employer within the terms of section 55 of The Labour Relations Act. That is the issue in the application to the Board under section 55 of the Act, referred to above. It is not a question upon which the complainant relies in this application or which we need concern ourselves further in relation to the merits of the section 79 complaint.



14. Secondly, the respondent submits that it has no employees at the plant in question. It asserts that all persons other than managerial staff working in the plant are supplied by and employed by Corporate Services, a registered business of which Mr. Robert Marran is the sole proprietor and manager.

15. Thirdly, the respondent says that the refusal to recall or hire the grievors, whether it be the refusal of the respondent or of Corporate Services, was untainted by anti-union motive. Mr. Marran gave evidence of specific reasons, all ostensibly unrelated to union activity, for the failure to recall each of the grievors.

16. We deal firstly with the contention that the respondent is not the employer and so has not participated in the refusal to recall the grievors. The evidence establishes that by a written contract dated May 31, 1976, Mr. Marran agreed, in the name of Corporate Services, to provide all seasonal employees to the respondent at its newly purchased plant from June 1, 1976 to December 31, 1976. The contract provides for the respondent to pay Mr. Marran on a production or piecework basis. The respondent submits that since Mr. Marran hires, fires and pays the workers Corporate Services is their employer. The evidence arrangement was a condition of his accepting the position of Production Manager with the respondent, as he did not want the problems of personnel relations as part of his responsibilities.

17. The complainant's position is that the respondent's contract with Corporate Services, indeed the creation of Corporate Services, is no more than a device to avoid the collective agreement and eliminate the union from the plant.

18. Much evidence was adduced and argument made going to the question of whether the respondent or Corporate Services is the employer. Both parties cited cases dealing with the tests by which the courts and labour tribunals have determined who is the employer as between a contractor supplying workers and the enterprise that makes use of their services (e.g., *Montreal Locomotive Works Ltd.* [1947] 1 DLR 161 [P.C.]; *Beer Precast Concrete and E. G. M. Cape & Co. Ltd.* [1970] OLRB Rep. May 224; *The Welland County Separate School Board* [1972] OLRB Rep. Jan. 990; *Swiss Canadian Management Company Limited and York Condominium Corporation No. 42* [1974] OLRB Rep. May 287).

19. Before applying the jurisprudence of the "outside contractor" cases, however, the Board must satisfy itself that the contractor in question is truly that, a contractor separate and apart from the enterprise that provides labour to the enterprise on an arm's length basis. And even if that is established, it must be determined whether the very act of contracting out by a party who would otherwise be the employer is itself contrary to The Labour Relations Act. That is to say, is the contracting out motivated in whole or in part by anti-union sentiment so as to be an act contrary to The Labour Relations Act? In our view those are the two issues in this complaint.

20. We find on the evidence before us that in fact the respondent Culverhouse Foods Incorporated and Corporate Services or Robert Marran are not in an arm's length relationship. This is not a situation of *bona fide* outside contracting for the supply of labour.

21. It is clear from the evidence that Corporate Services has no effective existence apart from Culverhouse Foods Incorporated. Prior to the respondent's purchase of the



plant Mr. Marran worked for the president and owner of the respondent as a consultant in relation to the proposed purchase. Corporate Services was created after the purchase and pursuant to the purported contract of May 31, 1976 and pursuant to the purported contract of May 31, 1976 mentioned in paragraph 15, *supra*. Corporate Services has no contracts to supply workers to anyone but the respondent. It has no separate offices, although it does have a telephone in its own name at the respondent's plant, where it uses office space rent free. It appears also to have a separate telephone in Mr. Marran's home. Mr. Marran is present at the plant every day of the week and frequently on Saturdays.

22. Two women are employed on an ongoing basis in the offices at the plant. They are, according to Mr. Marran, employees of Corporate Services whose function is to call workers from application lists as they are needed. It appears, however, that they also do secretarial and clerical work for the respondent Culverhouse Foods Incorporated. One of them, a Mrs. Mauer, has been employed in the plant in a secretarial capacity for 13 years.

23. The lines of demarcation between the respondent and Mr. Marran's firm are not as obvious to this Board as they are to Mr. Marran. We do not find here the kind of contracting out on an arm's length basis that this Board had before it in the *Swiss Canadian case, supra*.

24. But this Board need not and does not rest its decision in the instant complaint on a determination of the legal relationship between the respondent and Mr. Marran's Corporate Services. We are satisfied, on the totality of the evidence and quite apart from the nature of that relationship that, for reasons elaborated below, anti-union sentiment of the respondent was, at the outset, a motivation for the purported contract of the respondent with Corporate Services. We find on the evidence that that contract, in its first inception and subsequent operation, was intended to defeat the legitimate interests of the union and the employees whom it represented. Such a contract is, in its purpose and implementation, contrary to The Labour Relations Act. Acts intended to deprive employees and unions of their rights of organization and representation under The Labour Relations Act are contrary to the Act, and that is no less so when such acts are done by contract.

25. The evidence establishes a pattern of conduct more consistent with anti-union motive than with the explanation of the respondent. The respondent sought to establish reasons unrelated to anti-union motive for the refusal to recall each of the grievors. Mr. Marran testified that he refused to recall Mr. Boyd because of adverse reports respecting his character and past work performance. It should be noted that the respondent had sought, through the testimony of Mr. Nevard, to prove that Mr. Boyd had once been seen stealing canned goods from the plant. No particulars of such an allegation had been provided in advance and the question of the alleged criminal incident was not squarely put to Mr. Boyd in his earlier cross-examination. In those circumstances the Board did not permit the respondent to attempt to prove that allegation. (See section 47, Rules of Procedure, and section 8, The Statutory Powers Procedure Act, S.O. 1971, c.47). The respondent did not request an adjournment to provide the proper particulars. The respondent's evidence was also to the effect that Mr. Boyd was not hired because of a drinking problem.

26. Mr. Marran testified that the truck driver, Harry Deputowyth was not recalled because at first truck drivers were not needed and that when they were needed he had become undesirable because of a point of irritation between Mr. Marran and the wife of Mr.

Deputowyth. A seasonal worker at the plant for some 20 years, she had taken to calling the plant time and again with a view to getting recalled by the respondent. She never was recalled and as a result Mr. Deputowyth had angry words with one of the respondent's foremen. For this reason, says Mr. Marran, he was not recalled.

27. With respect to Mr. Sider, the testimony of Mr. Marran was that upon discovering that he had been treated for a problem of emotional or mental health Mr. Marran decided not to hire him. The basis of this decision was a doctor's note to the predecessor employer in January of 1976. In fact, it advised that Mr. Sider had been treated and was now well and able to work.

28. The respondent's position respecting Mr. Bailey was that he had not been a good worker for the predecessor employer. And with respect to Mr. Hines and Mr. Brown, Mr. Marran's evidence was that they were not recalled because of their demeanour at the time they attended at the plant with the union officers to lodge the grievances as described in paragraph 12 above. He testified that they appeared to him to be belligerent and disrespectful. Therefore they were not recalled.

29. We do not accept the assertion of Mr. Marran that it is mere coincidence that each of the employees represented by the union was not recalled or that the above reasons for not recalling the grievors are the only reasons and that anti-union sentiment played no part. Nor do we accept the submission of the respondent that Mr. Cudney was not motivated by anti-union sentiment. While it may be that accommodation of Mr. Roberts was a reason for the contract between the respondent and Corporate Services, the question is whether it was the only reason. It was not.

30. The refusal to recall or hire employees because of union activity is seldom admitted by an employer. Such acts are therefore usually required to be made out on circumstantial evidence and the inferences to be drawn from such evidence. (*The Barrie Examiner* [1975] OLRB Rep. Oct. 745 at 747). Considering the totality of evidence before the Board in the instant complaint we find a pattern of conduct that establishes breaches of sections 56, 58(a) and 61 of The Labour Relations Act. Specifically, and having regard to the anti-union statements of Mr. Nevard, Mr. Gartrell and Mr. Cudney and Mr. Marran and the demeanour and credibility of Mr. Marran in the witness box, we are satisfied, on the balance of probabilities, that because of its anti-union motive the respondent breached the Act by entering into its contract with Mr. Marran. The subsequent refusal of Mr. Marran to recall each of the grievors was done in furtherance of the respondent's intention to deprive the grievors of their right of representation by a trade union.

31. It should be noted that the statements of Mr. Nevard when he was a foreman of Culverhouse Foods Limited are not viewed by this Board as acts of intimidation or coercion attributable to the respondent. We view those statements merely as evidence consistent with anti-union *animus* in the respondent at the time of the purchase.

32. The respondent is ordered to forthwith reinstate the grievors to the positions which they held in the plant at Vineland Station where they were employed as full time employees by Culverhouse Foods Limited, at the wage rates provided in the collective agreement. The grievors shall therefore be reinstated forthwith as full time employees within the meaning of Article 1 of the said collective agreement, and not as seasonal employees.



33. The respondent is further ordered to compensate the grievors for wages to which they would have been entitled under the collective agreement, with appropriate allowance for periods during which they would have been normally and in good faith laid off by the respondent as they had occasionally been laid off by Culverhouse Foods Limited and with allowance for wages which they have earned elsewhere. For all of the grievors but William Boyd such compensation shall be calculated from May 28, 1976 to the date of this Order. With respect to Mr. Boyd compensation shall, subject to the aforementioned allowances, be calculated from July 1, 1976 to the date of this Order.

34. The Board shall remain seized of this matter in the event of any disagreement between the parties respecting the interpretation or implementation of this Order.

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**0944-76-R Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C., (Applicant), v. Tend-R-Fresh Plant United Co-operatives of Ontario (Respondent).**

**Certification – Representation vote – Effect of alleged misconduct by persons not parties to the application – Whether new vote will be ordered.**

**BEFORE:** Ian C.A. Springate, Vice-Chairman and Board Members J.E.C. Robinson, Q.C. and H. Simon.

**APPEARANCES:** *Paul Cavalluzzo for the applicant; D.W. Brady and George Wilkey for the respondent.*

**DECISION OF IAN C.A. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER H. SIMON:** January 28, 1977

1. This is an application for certification in which the Board by its decision of September 13, 1976 directed the taking of a representation vote. Prior to the taking of the vote the Registrar, pursuant to his authority under section 43 of the Board's Rules of Procedure, directed that "all interested persons ... refrain and desist from propaganda and electioneering" from midnight October 3, 1976 until the vote was taken. This period of time constituted the so-called "quiet period."

2. The representation vote was conducted on the evening of October 7, 1976, and on that date the returning officer issued his report. The report indicates that 30 employees cast ballots in opposition to the applicant while another 26 employees cast ballots in favor of being represented by the applicant. Following the taking of the vote the applicant filed certain submissions relating to the vote with the Board, and on the basis of those submissions the Board listed the matter for a second hearing. At the hearing counsel for the applicant requested that the Board set aside the results of the representation vote and direct the taking of a new vote.



3. The representation vote was conducted in the office area of the respondent's premises at Petersburg. Employees marked their ballots behind closed doors in two small outer offices while scrutineers and the returning officer with the ballot box were stationed outside of those offices. Mr. David Bird, who as an employee in the respondent's cryovac department was among the last 25 or so employees to vote, testified that during the entire period that he was in one of the offices marking his ballot he could hear an unidentified person outside of the window in the darkness yelling "vote no, vote no." Mr. Bird's testimony in this regard is buttressed by the fact that on his way back to his department Mr. Bird reported the yelling to Ms. Pat Slater, a fellow employee and apparent union supporter. (It should be noted that in light of Mr. Bird's testimony, which was given under oath, we decline to accept the hearsay evidence of Mr. O'Neill relating to a "test" conducted to ascertain whether or not Mr. Bird could in fact have heard someone outside yelling without the yelling at the same time being heard in the area where the returning officer was stationed.) Mr. Slater passed the information concerning the yelling on to her lead hand Sharon Bast. Miss Bast in turn informed her foreman, Mr. Victor O'Neill, who at the time was serving as the respondent's scrutineer at the vote. Subsequent to Mr. O'Neill being informed of the yelling no other employees presented themselves for the purpose of casting a ballot.

4. Another employee, Mr. Timothy Hart, testified that at one point he left a line of employees waiting to vote to go to a washroom. He stated that on his way to the washroom he passed through the respondent's loading docks, and that while so doing some seven or eight employees who were working there gave a thumbs down sign and called out "the union sucks." Mr. Hart also testified that on returning through the loading docks on his way to the voting area he again encountered calls of "the union sucks" to which were also added calls of "vote no."

5. In his submissions counsel for the applicant contended that with respect to the yelling outside of the window, the respondent itself became a party "after the fact" to this occurrence because of both Mr. O'Neill's failure to do anything about it once he was informed of it, and also because of his failure to immediately inform the returning officer and scrutineer of the yelling. While we agree that it would have been better had Mr. O'Neill so informed the other scrutineer and the returning officer, we cannot accept that somehow this made the respondent a party to the yelling. Further, in reality there was little if anything Mr. O'Neill could have effectively done having regard to the fact that by the time he was informed of the yelling not only had it already come to an end but also all of the employees who were going to vote had already cast ballots.

6. During the hearing there was a good deal of testimony introduced concerning conversations which may have taken place between Miss Christine Bolik, an employee in the bargaining unit, and her father who is the respondent's assistant superintendent, as well as an alleged statement made by Miss Bolik to another employee concerning what was said to Miss Bolik by her father. It appears that little, if any, benefit is to be gained by reviewing this evidence. Suffice it to say that the evidence does not indicate that Miss Bolik spoke to any employees concerning the representation vote or that she told them anything allegedly said to her by her father concerning the vote. On this basis we find that Miss Bolik did not say anything to other employees which was likely to unduly affect the vote of other employees. We would also note that there is no direct evidence before the Board of any improper or coercive statements being made by Mr. Bolik to his daughter, and therefore we dismiss completely the applicant's contention that Mr. Bolik through his discussions with his

daughter violated section 61 of the Act and that such a violation may have affected the outcome of the vote.

7. Counsel for the applicant contended that the persons responsible for the yelling both outside of the window and in the loading docks had violated the Registrar's prohibition against propaganda and electioneering during the quiet period. Counsel for the respondent, however, took the contrary view especially with respect to the person yelling outside the window. It was his submission that there was no evidence before the Board to show that this person was in fact an employee of the respondent and thus an interested person within the meaning of the Registrar's prohibition. Having carefully considered the matter, however, we are satisfied that the actions of the person who yelled outside of the window as well as the actions of the employees at the loading docks constituted violations of the Registrar's prohibition against propaganda and electioneering during the quiet period. When a person becomes so interested in the outcome of a representation vote that he deliberately seeks to affect the outcome of that vote during the period when the vote is actually being taken, then in our view he brings himself within the term "interested person" as it is employed in the Registrar's prohibition.

8. Where, as here, the Registrar's prohibition against propaganda and electioneering during the quiet period has been breached by persons not acting under the direction or control of either of the parties, the mere fact that the breaches occurred does not automatically justify the setting aside of the results of the vote and the directing of a new representation vote. (See: *International Nickel of Canada, Limited*, 62 CLLC Para. 16,257.) Rather the Board seeks to determine whether or not the breaches of the prohibition were intended to influence the outcome of the vote, and also whether or not they were in fact likely to influence the outcome of the vote. (See: *Ontario Steel Products Company Limited, Division C*, [1961] OLRB Rep. 174.)

9. In the instant case we have before us the testimony of an employee that during the period when he was actually marking his ballot in one of the two offices being used for that purpose he could hear a person outside yelling "vote no, vote no." While it is clear that this yelling did not last for a very long period of time, the evidence does not indicate one way or the other whether the yelling might also have been heard by any additional employees. There is also evidence before the Board of how an employee just shortly prior to his casting a ballot was subjected to the shouts of a number of individuals which both referred to the applicant in derogatory terms and also urged him to vote "no" on his ballot. Having regard to these facts we have no hesitation in finding that the breaches of the Registrar's prohibition were specifically intended to influence the outcome of the vote. Further, having particular regard to the relative closeness of the result of the representation vote, we feel there exists a reasonable possibility that the result of the vote may have been influenced by the breaches of the Registrar's prohibition. This being the case we have determined that a new representation vote should be directed.

10. Neither the applicant nor the respondent were in any way responsible for the breaches of the Registrar's prohibition against propaganda and campaigning during the quiet period. Instead the breaches appear to have had their origin in the opposition by a number of persons to the applicant trade union and in the fact that these persons actively sought at the last minute to seek to influence the outcome of the vote. This being the case we direct the Registrar to seek to ensure that the new representation vote is conducted under



circumstances which are likely to minimize the possibility of persons being able to communicate their views to employees in the bargaining unit during the period that the representation vote is being conducted.

11. We hereby direct that the representation vote conducted in this matter on October 7, 1976 be set aside. A new representation vote will be taken of the employees of the respondent in the bargaining unit described by the Board in its decision of September 13, 1976. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

12. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

13. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER J.E.C. ROBINSON, Q.C.**

While I am cognizant that the decision of the majority will generally be equitable to both trade union and management, I am reluctant to order a new vote in these circumstances when blame for the occurrences which took place during the "no propaganda" period cannot be attached to either of the parties.

To do otherwise, would seem to me to open the door to abuse by other parties in the hope that such abuse might result in the conducting of another vote by the unsuccessful party.

Accordingly, I would not order the taking of another representation vote where fault cannot be attached to the management in this case.

I would so find.

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**0831-75-R** Retail Clerks Union, Local 486, (Applicant), v. **Leons Furniture Limited**, (Respondent), v. Group of Employees, (Objectors).

**Certification – Membership Evidence – Effect of failure of collector to actually sign membership evidence – Whether membership evidence otherwise improper is defective because collector's name is only printed.**

**BEFORE:** George W. Adams, Vice-Chairman, and Board Members H.J.F. Ade and D.B. Archer.

**APPEARANCES AT THE HEARING:** *A. Ryder, I. J. Roland and Barry Bailey for the applicant; R. C. Filion and C. J. Leon for the respondent; Robert Raizienne for the objectors.*

**DECISION OF THE BOARD:** October 22, 1975



1. This is an application for certification.
2. The name "Leons Furniture Warehouse & Showroom" appearing in the style of cause of this application as the name of the respondent is amended to read: "Leons Furniture Limited".
3. The applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*, R.S.O. 1970, c. 232.
4. At the outset of the case the Board drew the parties' attention to a possible defect in the membership evidence submitted by the applicant. The evidence was in the form of applications for membership combined with written confirmations acknowledging the payment of the initiation fees. The Board was informed that before a card is executed an additional receipt is attached to combined confirmation. When the initiation fee is paid, the additional receipt is detached along its perforated line and given the payer while the rest of the card is filed with the Board.
5. In the facts at hand the employees' signatures appeared both on the application for membership portion of the cards and along the line above a heading (Member's Signature) on the receipt or acknowledgement of payment portion of the cards. As well, the amount of the initiation fee was inserted on the latter portion of the card. Then on a line following the words "\$1.00 Initiation Fee received by" – a line which is obviously allocated to the payee or collector's name – a person's name was printed and because of variations in the printing it was clear that the collector for at least seven of the cards had not signed or printed his own name on the receipt portion of the card. In other words, the actual collectors' names appeared on all the cards but not in the form of their personal signatures. Accordingly, the Board requested argument on whether the applicant had met minimal evidentiary requirements for membership evidence.
6. The applicant submitted that the Board has never required the signature of the collector; that section 48(1) of the Board's Rules of Procedure and Form 8 of its procedural forms outline the minimal requirements of membership evidence and neither require the signature of the collector; and finally, in light of the Board's rules and forms, the Board lacked jurisdiction to stipulate additional requirements by way of adjudication relied upon *Re Hopedale Developments Ltd. and Town of Oakville* [1965] 1 OR 259 (Ont. C.A.). With respect to its other submissions the Board's attention was directed to *Mercury Terrazzo Limited* [1970] OLRB M.R. June 291; *Williams Machines Ltd.* [1972] OLRB M.R. Oct. 879; and the cases discussed therein.
7. The respondent submitted that the Board had power to prescribe additional evidentiary requirements with respect to membership evidence under section 92(2)(j) of the Act and that it had exercised this power by requiring the collector's signature. He referred the Board to the cases relied upon by the applicant as well as to *Sterling Tile Co.* [1970] OLRB M.R. Feb. 1, 346; *Dunker Construction Ltd.* [1970] OLRB M.R. Oct. 779; and *Tele-Direct Ltd.* [1971] OLRB M.R. Aug. 490.
8. Section 1(1)(j) of the Act defines member as including a person who (i) has applied for membership in the trade union, and (ii) has paid to the trade union on his own behalf an amount of at least \$1.00 in respect of initiation fees or monthly dues of the trade un-

ion. Section 92(2)(j) specifically gives the Board the power “to determine the form in which and the time as of which evidence of membership in a trade union ... shall be presented to the Board on an application for certification...and to refuse to accept any evidence of membership...that is not presented in the form and as of the time so determined”. We note that section 92 does stipulate that this power is to be exercised by way of the Board’s rules-making authority under section 91(12) – an authority subject to the approval of the Lieutenant Governor. Accordingly, we are satisfied that while our rules of procedure and forms may speak to the matters referred to in section 92(2)(j), section 92(2)(j) is an independent power that can be exercised by way of adjudication. Thus in fully appreciating the required form of membership evidence one must make reference to the Board’s Rules of Procedure *and* to its jurisprudence – a jurisprudence based upon the power conferred upon the Board by section 92(2)(j) that renders the decision of the Ontario Court of Appeal in *Re Hopedale Developments Ltd. and Town of Oakville (supra)* inapplicable. In that case the Ontario Municipal Board, without the benefit of a section like section 92(2)(j), fettered its statutory obligation with restrictive principles declared in earlier and unrelated litigation before it.

9. Having said this we ought to review the Board’s membership evidence requirements by first examining Rule 48(1) of the Rules of Procedure. It reads:

48. – (1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

(i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the terminal date for the application.

The section is mandatory in nature and requires the signature of the employee to be on the evidence of membership. It makes no reference to any other signature.

10. Paragraph 3 of Form 8 reads:

3. (Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of fees or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person

whose name appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

The wording of this paragraph is open to a number of possible interpretations. First, although the wording makes it clear that the collector's name must appear on "the receipts or other acknowledgments of payment on account of...initiation fees", there is no specific indication that it must appear in the form of a signature. Thus if this approach is adopted the applicant's membership evidence complies with at least Form 8. A second possibility arises from the juxtaposition of the word "receipts" with the phrase "other acknowledgments of payment on account of...initiation fees". In this respect, and having regard to the maximum "*noscitur a sociis*", it can be argued that if the term receipt implies a signature of the payee the subsequent phrase can only have an independent yet related meaning if it applies to something like that which the Board is confronted with in this case. Were it otherwise the phrase beginning "other acknowledgment..." would be superfluous. A third and, for the purposes of this decision, final possibility arises out of the commercial notion that for a receipt or other acknowledgment to be useful to a payor, the payee must sign or in some other way personalize the evidence documenting the transaction. With this meaning ascribed to a receipt or other acknowledgement Form 8 would then envisage the appearance of the collector's name in the form of a signature. And the membership evidence before us fails in this regard. But with this ambiguity in meaning, Form 8 cannot be an exclusive source for ascertaining the Board's policies and the Board's decisions must therefore be carefully reviewed.

11. Until the regulations to the legislation were extensively amended by O.R. 268/60, paragraph 7a of Form 2 (a form entitled *Application for certification*) read:

7a. The applicant submits with this application documentary evidence of compliance by employees of the respondent with the standard of the Board respecting membership in the applicant for the purposes of certification, as follows:

- (a) individual applications for membership signed by the employee of the respondent, and
- (b) (i) individual receipts or duplicate receipts for payment of at least \$1 by employees of the respondent on account of the prescribed initiation fee or monthly dues of the applicant, signed by the payee or countersigned by the payer, or
- (ii) evidence that employees of the respondent have presented themselves for initiation, have taken the members' obligation or have done some other act consistent with membership in the applicant as follows:

The paragraph is an important one in that the Board's early cases used it as the starting point for outlining the Board's requirements. But it too, by itself, is an ambiguous statement. One interpretation of this requirement is that the collector was to sign and the payer's signature was optional. This version is arrived at by focusing on the use of the words "countersign by the payer". If countersign means the placing of another signature on a doc-



ument already bearing a signature the conjunction “or” could represent an intent that the second signature is optional but the first signature is mandatory. Thus this version would mean that Form 2 provided that the collector’s (payee’s) signature was a minimum requirement. However, by using the words, phrases or clauses representing alternatives – paragraph 7a could be interpreted to mean that the payee’s signature *or* the payer’s signature was required – and therefore an ambiguity arises.

12. But regardless of which interpretation is preferred, the Board has informed the parties that it wants both signatures on all receipts for initiation fees or monthly dues. And this request was expressed in *The City of Windsor* (1953), 53 CLLC 17,050, in the following way:

*Although not mandatory*, the Board has, for some months now, requested that all receipts for initiation fees or monthly dues by [sic] both signed by the payer and countersigned by the payee, on the assumption that this extra precaution provides more adequate protection for the Board and for the applicant relying on documentary evidence. [emphasis added]

And the reason for this request is important. Membership evidence is not shown to a respondent and is heavily relied upon by the Board in determining that the requirement of section 1(1)(j) have been met and, in that way, ascertaining whether the employees wish to be represented by an applicant trade union. For this reason the Board wants the best documentation of the necessary requirements possible. And two signatures on a receipt – one attesting to the payment of the initiation fee and the other attesting to its receipt – is thought to provide the greatest insurance.

13. But it is also important to note that *The City of Windsor* case prefaced its request with the words “although not mandatory”. In other words, the presence of both signatures is preferable but it is not the exclusive form by which the Board will be satisfied of the dollar payment. For example in *Kennametal Tools & Manufacturing Co. Limited* [1963] OLRB M.R. Nov. 422 the receipts submitted by the trade union indicated the payment of one dollar and contained the signature of the collector. However, it was determined that while the written name of the individual member appeared on the receipt above the words “new member’s signature” the signatures did not correspond with the specimen signatures filed by the respondent and were in fact inserted by the collector. Having regard to these facts the Board refused to certify the applicant without a confirmatory representation vote and in so doing wrote:

In support of its application for certification, the applicant submitted as evidence of membership twenty membership applications together with twenty corresponding receipts. The respondent filed specimen signatures for a list of twenty-three employees who it states were in the bargaining unit sought by the applicant on the date of the making of the application. A comparison of the union’s evidence of membership with the respondent’s list reveals that the twenty membership applications are for persons in the bargaining unit on the date of the making of the application. The membership applications bear the signatures of the persons applying for membership. The receipts which indicate the pay-

ment of one dollar in each case bear the signature of the collector and ostensibly are countersigned by the new members. Since the signatures on the receipt appearing above the words "new members signature" did not correspond with the specimen signatures filed by the respondent, the Board at the hearing of this application on September 25th inquired into the discrepancy.

The Board was informed by the representative of the applicant that the names appearing above the words "new member's signature" were in fact signed by the collectors. Having regard to the fact that none of the receipts submitted by the applicant indicating the payment of one dollar are countersigned and the non-disclosure of the applicant with respect to countersignatures, the Board finds that the evidence of membership is sufficiently weakened so as to disentitle the applicant to certification without a representation vote.

14. A similar result, more clearly reflecting the continuation and meaning of *The City of Windsor* policy, is reflected in *B. Moscone Tile Co. Ltd.* [1970] OLRB M.R. Apr. 44 where the applicant had submitted combination application for membership and receipt cards. The signature of the individual employee appeared on the application but the receipts, bearing the signature of the collector and indicating the payment of \$1.00, had not been signed by the employee – although the name of the employee appeared. In ordering a representation vote the Board wrote:

...It is the Board's practice to require that all receipts for initiation fees or monthly dues be both signed by the payer and countersigned by the payee, on the assumption that this extra precaution provides more adequate protection for the Board and for the applicant relying on documentary evidence of membership. (See *Sterling Tile Company* case, Board File No. 17112-69-R.) Having regard to the fact that none of the receipts submitted by the applicant indicating the payment of \$1.00 are countersigned, the Board finds that the evidence of membership is sufficiently weakened as to disentitle the applicant to certification without a representation vote.

15. However, the fact that a representation vote will not always be necessary where the Board's preference for two signatures on the receipt or other acknowledgment remains unsatisfied is demonstrated in *Mercury Terrazzo Limited* [1970] OLRB M.R. June 291 where the receipt, bearing the collector's signature, was on the reverse side of the application card and the individual employee had only signed the application – although his name was printed on the receipt. In issuing a certificate without a representation vote the Board emphasized that the applicant had made it unequivocally clear that the receipts were not "countersigned" and thus the Board was in no way misled as in *Kennametal*. The Board also noted that Form 54, Declaration Concerning Membership Documents, Construction Industry, had been filed by the president of the applicant which, based on his personal knowledge, confirmed the accuracy of the membership documents. Finally, paragraph 9 of that decision indicates the panel's understanding of the general approach to be taken with regard to the absence of an individual member's signature on the receipt. It reads:



9. The Board, of necessity, has to rely heavily on the documentary evidence of membership submitted in support of an application for certification. For that reason, although the Board has not made it absolutely mandatory, it is highly desirable, and the Board requests, that receipts submitted indicating the payment of initiation fees be signed not only by the collectors but also countersigned by the applicants for membership. This precaution provides more adequate protection for both the Board and the applicant trade union which is relying on the documentary evidence. Where there is any doubt on the part of the Board as to the propriety of the procedures followed by an applicant trade union in the securing of the evidence of membership upon which it relies, the absence of countersignatures on the receipts of initiation fees must weigh heavily against the applicant.

16. After reviewing these cases we believe it is fair to say that the absence of an employee's signature on a receipt will not always be fatal in and of itself. Whether the evidence will be accepted at all or only with the confirmation of a representation vote must depend on the nature of the evidence and the particular circumstances surrounding each case. And it can be further said that if a trade union wants certainty in the way its application will be treated by the Board and thus avoid the risks reflected in the preceding decisions the payment of a dollar should be documented by the signature of the collector and the countersignature of the individual member paying the money.

17. Unfortunately none of these cases deal with the significance of the collector's signature on a receipt although a close reading of the cases suggest that its presence is assumed. And presumably relying upon this assumption, counsel to the respondent agreed that the pragmatic approach reflected in *Mercury Terrazzo* is one confined to the additional signature of an individual member – the countersignature – and is not applicable to the collector's signature. However no prior decisions have specifically considered and adopted this proposition – at least with respect to the particular kind of membership evidence before us. In fact in *International Nickel Company of Canada Limited* case [1966] OLRB M.R. Jan. 698 the Board said that it was “not concerned with the fact that the collector's name may have been printed on the receipt [because the] identity of the collector is the important thing”. And we would observe that the Board has no way of verifying the signatures of collectors in that specimen signatures are not filed for these persons.

Another decision considering a somewhat similar problem is *Williams Machines Ltd.* [1972] OLRB M.R. 879. In that case the Board was concerned with certificates of membership that had been signed by the employee but no official of the applicant had countersigned the documents and no signature of the collector of the initiation fee appeared on any of the documents. In dismissing the application the Board wrote:

6. The membership evidence filed by the applicant in this case does not consist of application for membership cards but is merely a certificate signed by the person purporting to be a member wherein the person states that he is a member and has paid an initiation fee and further agrees to pay monthly dues. There is nothing from the applicant which verifies the statement made by the employee and the certificate is not a certificate by one of the applicant's officers. Again, while the person



purporting to be a member claims that he has paid \$1.00, there is no receipt from the applicant acknowledged such payment nor is the collector of such payment identified.

7. Finally, since the name of the collector does not appear on the fact of the documentary evidence filed by the applicant, the statement contained in Item 3 of Form 8 submitted by the applicant, if not meaningless, is patently untrue.

8. In view of the facts set out above and the requirements of The Labour Relations Act we find that the documentary evidence of membership submitted by the applicant is entirely unsatisfactory and we are accordingly unable to accept such evidence as proof of membership in the applicant.

9. Accordingly, it appears to the Board on an examination of the records that the applicant and the records of the respondent that less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.

10. The application of the applicant is therefore dismissed.

Thus although the signatures of the collectors were not present, the Board emphasized the entire absence of a receipt and the failure to "identify" the collector. It also considered these defects in the light of the declaration in Form 8 which could not therefore have been true.

18. On the other hand, although the *Williams Machine* case did not stress the point, the Board has required that certificates of membership – in contrast to combination application for membership and receipt cards – must be signed by the employee and must also be certified correct by an officer of the trade union who is in a position to do so. This requirement is emphasized in *A. Lovisa Masonry Contractor* [1970] OLRB M.R. July 510 where the Board wrote:

...Certificates of membership are frequently used by some trade unions in applications to the Board in lieu of dues books signed by the members which are regarded by the Board as the best proof of membership in a trade union. The surrender of dues books by members, however, frequently causes hardship and inconvenience to the member and his trade union. It is for this reason that the Board has accepted certificates of membership instead of dues books. However, the Board has required that these certificates of membership contain statements by the employee for the trade union and the month and year for which his dues are paid. These statements must be signed by the employee and must also be certified correct by an officer of the trade union who is in a position to do so. Reference is made to the *Frank Licari & Sons* case, OLRB M.R. April 1967, p. 57.

The documentary evidence of membership submitted by the applicant has not been certified correct by an officer of the applicant and therefore does not meet the Board's requirements respecting certificates of membership. The Board, accordingly, finds that the applicant has failed to establish that it had any members at the time the application was made in any bargaining unit the Board might find appropriate for this application.

19. But, certificates of membership aside, it can be said the Board has not had occasion to specifically state that the collector's signature must always be on a receipt or other acknowledgment of payment. Although we believe that most parties coming before the Board have assumed that the collector's signature is necessary, a specific policy statement like that of the *Lovisa* case or that of the *Mercury Terrazzo* case has not been made. Accordingly, a choice between the two approaches confronts us in this case. The *Lovisa* rule provides certainty and predictability. The *Mercury Terrazzo* policy is a more pragmatic approach centered on the Board's obligation to satisfy itself that \$1 has been paid. *Mercury Terrazzo* and the preceeding cases were dealing with the absence of a signature that can be characterized as a form of insurance policy for both the Board and the parties. And pragmatism, even at the expense of administrative certainty, would appear to be a sound and fair policy when considering the absence of a safeguard. On the other hand the *Lovisa* approach would appear to have been adopted in the construction industry because the best evidence – the dues books – is not available to the Board without hardship and inconvenience to both the member and the trade union. A substitute was therefore fashioned.

20. In the facts at hand, we believe the *Mercury Terrazzo* approach is the most appropriate. The receipts are attached to the membership applications; the applications are signed; the receipts indicate \$1.00 has been paid; the receipts are signed by the employees; and the collector's name appears in a space that does not purport to be allocated to a signature in contrast to the space allocated for the employee's name. Moreover, a Form 8 declaration has been filed by the president of the applicant to the effect that the persons whose names appear on the receipts actually collected the amount shown thereon. While the absence of the collector's signature may "weigh heavily" against the applicant after all the surrounding evidence of this case is heard, we are not prepared to dismiss the application on this factor alone.

21. The Registrar is directed to schedule the matter for hearing.

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**1643-76-U Claude Browne, (Complainant), v Canron Ltd., Eastern Structural Division, (Respondent).**  
Practice

**Procedure – Effect of applicant intentionally misnaming party in a frivolous and inflammatory manner – Whether abuse of process justifying dismissal of complaint.**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

**APPEARANCES:** *Claude Browne for the applicant; James Hassell and Edward T. McDermott for the respondent.*

**DECISION OF THE BOARD:** January 31, 1977

1. This is a complaint filed under section 79 of the Act. The complainant alleges breaches of sections 3, 56, 58, 61 and 71 of The Labour Relations Act on behalf of the respondent.
2. By telegram dated January 19, 1977, the complainant requested an adjournment of the hearing scheduled for the next day, January 20, 1977. The telegram stated as the reason, "... I have been advised by council (sic) that he has been served and must appear as a party in the Supreme Court of Ontario on Thursday, January 20." At the hearing the same request was made and dealt with as a preliminary matter.
3. The request for an adjournment was denied. It is the general practice of this Board, grounded in considerations of sound labour relations policy, not to grant adjournments except by agreement of the parties in all but exceptional circumstances. (*Nick Masney Hotels Ltd.* [1970] 70 CLLC ¶14,020 (Ont. C.A.). Each case must nevertheless be considered on its individual merits. In the instant case the formal complaint did not indicate any counsel or agent acting on behalf of the complainant either directly or by way of the address of the complainant for service. Mr. Browne's own representations were that the inability of his agent to appear was known to him for some 2 or 3 days. There was no suggestion that he had either notified the respondent of the need for an adjournment at the earliest possible time or had sought alternative representation. As was otherwise stated in the *Nick Masney Hotels Ltd.* case, *supra*, this Board is not a court and cannot, given the particular exigencies of labour relations problems, proceed in the pace that may be appropriate to a court in matters of civil litigation. We do not see in the facts presented here any reason to depart from the Board's general practice.
4. The respondent next raised a preliminary objection to the form of the complaint. The unchallenged representation of the employer is that the complainant has worked for the respondent for over two years and that the names of foremen and employees in the plant are clearly printed on their hats. The written complaint referred to Mr. Martin Mauk, general foreman of the respondent as Martin Muck. Mr. Harold Moreau, an employee against whom part of the complaint is aimed, is referred to as "Mr. Harold Marrow." The name of one foreman, Mr. Philip Callus, was unchanged.
5. The most serious question is raised by the wording of paragraph 4 (b) of the complaint. There Mr. Browne alleges that he was assigned to work as a helper to a fitter who is described as "alias 'Il Venduto', Italian for "the traitor".



6. Citing the Board's authority under section 58 of its Rules of Practice the respondent requested that because of its libelous and scandalous attack on the individual concerned paragraph 4 (b) be struck from the complaint and that no evidence be heard respecting the allegation made in that paragraph and that the misspellings be corrected. The respondent stated that its request was based on its desire to protect the persons named.

7. The Board has a broader concern, however. It unanimously dismissed the complaint as being so wanting in form as to be an abuse of its process. Quite apart from the offense to the individuals concerned this Board, like any tribunal, has a duty to safeguard the integrity of its proceedings. It cannot permit the use of forms in Board proceedings as a means to convey personal insult. The Legislature did not intend and common decency will not allow this tribunal to be demeaned as a conduit for frivolous, vexatious or inflammatory matter.

8. We note that the Board heard no evidence and makes no findings as to the merits of Mr. Browne's complaint. The dismissal of the complaint relates solely to its form.

9. The respondent asked for an award of costs to be made against the complainant. We make no order as to costs. Respecting the issue of whether this Board has jurisdiction to award costs and, if it does, whether it should, we do no more than refer to what the Board has already said in that regard in *Repac Construction & Materials Limited and Sherman Sand and Gravel Limited* [1976] OLRB Rep. Oct. 610.









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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1976

## Applications for Certification

### BARGAINING AGENTS CERTIFIED DURING DECEMBER

#### No Vote Conducted

**0776-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Kenmount Holdings Ltd. (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 3 Glamorgan Avenue and 5 Glamorgan Avenue in Metropolitan Toronto, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (2 employees in the unit).

**1082-76-R:** Canadian Union of Public Employees (Applicant) v. The Children's Aid Society of the District of Nipissing (Respondent).

Unit: "all employees of the respondent at its offices at North Bay and in the District of Nipissing, save and except supervisors and persons above the rank of supervisors, the secretary to the local Director, all persons regularly employed for not more than 24 hours per week and students employed by the respondent during the school vacation period." (18 employees in the unit).

**1151-76-R:** United Steelworkers of America (Applicant) v. Jutras Die Casting Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office and sales staff and students employed during the school vacation period." (45 employees in the unit).

**1152-76-R:** United Steelworkers of America (Applicant) v. Union Miniere Explorations and Mining Corporation Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: "all office, clerical and technical employees of the respondent in the Township of Ponsford in the District of Kenora (Patricia portion) save and except supervisors, persons above the rank of supervisor, one confidential secretary to each of the personnel superintendent and the mine manager, students employed during the school vacation period, students in the Waterloo University co-operative program who are employed by the respondent, and persons covered by the decision and certificate of the Ontario Labour Relations Board both of which are dated July 21, 1976." (30 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "students employed during the school vacation period and students employed in the Waterloo University Co-operative Program." (2 employees in the unit).

**1224-76-R:** United Steelworkers of America (Applicant) v. Canadian Wire Brush Company Division of Sweepco Industries Inc. (Respondent).

: "all employees of the respondent at Barrie, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than 24 hours per week, and students employed during the school vacation period." (25 employees in the unit).

**1238-76-R:** Operative Plasterers and Cement Masons International Association of the United States and Canada, Local #124, Ottawa – Hull (Applicant) v. Ottawa G.S.B. Construction Co. Ltd. (Respondent).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in the unit). (*clarity note* – see Report of full decision [1976] OLRB Rep. December).

**1282-76-R:** Retail Clerks Union Local 206 (Applicant) v. Avis Transport of Canada Ltd. (Respondent).

Unit: "all employees of the respondent, in the Greater Toronto District (Avis Reference No. 85-7C); including the Municipalities of Metropolitan Toronto, Mississauga and the Regional Municipality of Hamilton-Wentworth, save and except Rental Sales Agents, Senior Rental Sales Agents, Mechanics, Office Staff, Supervisors, and persons above that rank." (29 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – Report of full decision [1976] OLRB Rep. December).

**1283-76-R:** Retail Clerks Union Local 206 (Applicant) v. Avis Transport of Canada Ltd. (Respondent).

Unit: "all Rental Sales Agents and All Senior Rental Sales Agents employed by the respondent in the Greater Toronto District (Avis reference No. 85-7C); which includes the municipalities of Metropolitan Toronto, Mississauga, and the Regional Municipality of Hamilton-Wentworth, save and except Counter Supervisors and persons above that rank." (30 employees in the unit). (*Having regard to the agreement of the parties*).

**1334-76-R:** Labourers International Union of North America Local Union 493 (Applicant) v. Sportspal Enterprises Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Callander, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (24 employees in the unit). (*Having regard to the agreement of the parties*).

**1355-76-R:** Canadian Union of Public Employees (Applicant) v. Canadian Mental Health Association (Ottawa Branch) (Respondent).

Unit: "all employees of the respondent at Ottawa, Ontario, save and except the Executive Director, Office Manager, Project Director and persons above the rank of Project Director, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**1367-76-R:** Gulf Oil of Canada Employees' Bargaining Unit (Applicant) v. Gulf Oil Canada Limited (Respondent) v. Oil, Chemical & Atomic Workers International Union (Intervener).

Unit: “all employees of the respondent working at its Clarkson Branch in the City of Mississauga, save and except dispatchers, foremen, persons above the rank of dispatcher or foreman, office and sales staff and students employed during the school vacation period.” (68 employees in the unit). (*Having regard to the agreement of the parties*).

**1380-76-R:** Optical & Plastic Technicians & Allied Union Local 67, U.H.C. & M.W.I.U. – C.L.C. (Applicant) v. Central Optical Inc. (Respondent) v. Group of Employees (Objectors).

: “all laboratory employees of the respondent in Barrie, Ontario, save and except foreman, forelady, persons above the rank of foreman or forelady, office and sales staff, and persons regularly employed for not more than twenty-four (24) hours per week.” (18 employees in the unit). (*Having regard to the agreement of the parties*).

**1388-76-R:** Local Union 1687 of the International Brotherhood of Electrical Workers (Applicant) v. G. Grossi Plumbing and Heating (Respondent).

Unit: “all electricians and electricians’ apprentices in the employ of the respondent within a twenty mile radius of the North Bay Post Office, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

**1389-76-R:** The Canadian Union of Public Employees (Applicant) v. The Bruce-Grey County Roman Catholic Separate School Board (Respondent).

Unit: “all employees of the respondent engaged in maintenance and plant operations in its schools, save and except supervisor, persons above the rank of supervisor, office staff, and persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (27 employees in the unit).

**1390-76-R:** Association of Warehousing and Shipping Employees (Applicant) v. Fast Service Shipping Terminals Canada Ltd. (Respondent).

Unit: “all employees of the respondent employed in the municipality of Metropolitan Toronto save and except foremen and persons above the rank of foreman, office and sales staff.” (14 employees in the unit).

**1391-76-R:** Retail Clerks Union, Local 206 (Applicant) v. Budget Car Rentals Toronto Limited (Respondent).

Unit: “all of the employees of the respondent at or out of its operations in the City of Mississauga, except bus drivers, supervisors, persons above the rank of supervisors, office, clerical and technical staff.” (28 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision [1976] OLRB Rep. December*).

**1402-76-R:** Tobacco Workers’ International Union (Applicant) v. Imperial Leaf Tobacco Company of Canada Limited (Respondent) v. Canadian Chemical Workers Union (Intervener).

Unit: “all employees of the respondent at its plant located on John Street North in the Town of Aylmer, Ontario, save and except foremen, supervisors, persons above the rank of foreman or supervisor, office, technical, grading and buying staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and seasonal employees covered by a subsisting collective agreement between the respondent and Local 10 of the Canadian Chemical Workers Union dated April 21, 1976.” (37 employees in the unit).



**1407-76-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Heron Cable Industries Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent, in Waterloo, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (93 employees in the unit).

**1422-76-R:** Labourers' International Union of North America, Local 837 (Applicant) v. Paul Caruthers Construction (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**1423-76-R:** Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Sam Butti Wholesale, Div. of Allind Distributors Limited (Respondent).

Unit: "all employees of the respondent working at North Bay, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, and students employed during the school vacation period." (3 employees in the unit). (*Having regard to the above determination, as well as to the agreement of the parties*).

**1428-76-R:** Canadian Union of Operating Engineers (Applicant) v. Rank City Wall Canada Limited (Respondent).

Unit: "all building operators and persons primarily engaged as their helpers employed by the respondent at 4881 Yonge Street, Willowdale, Ontario, save and except the Supervisor and persons above the rank of supervisor." (7 employees in the unit). (*Having regard to the agreement of the parties*).

**1430-76-R:** Canadian Union of Public Employees (Applicant) v. Disabled & Aged Regional Transit System (Respondent).

Unit: "all employees of the respondent in The Regional Municipality of Hamilton Wentworth save and except office staff, non-working foremen and those above the rank of non-working foreman." (6 employees in the unit).

**1435-76-R:** Amalgamated Clothing and Textile Workers Union Toronto Joint Board (Applicant) v. Don-Ivan Associates Limited operating as Daisy Decorative Products (Respondent).

Unit: "all employees of the respondent at 329 Geary Avenue, Toronto and 110 Beaver Street, Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, designers, mechanics, truck drivers, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (111 employees in the unit). (*Having regard to the agreement of the parties*).

**1437-76-R:** Teamsters Local Union No. 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Vallance Brown & Co. Limited (Respondent) v. Employee (Objector).

Unit: “all employees of the respondent working at St. Catharines, Ontario, save and except foremen, those above the rank of foreman, office and sales staff and students employed during the school vacation period.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

**1438-76-R:** Canadian Union of Public Employees (Applicant) v. Dufferin-Peel Roman Catholic Separate School Board (Respondent).

Unit: “all office employees in the administrative staff employed in the Board’s administrative offices in the Counties of Peel-Dufferin, save and except supervisors and those above the rank of supervisor, secretaries to the Director of Education, Superintendents, Superintendent of Business Affairs and Personnel Co-ordinator, employees employed on a casual basis of intermittent and irregular hire, government-funded programs, and students employed during the school vacation period, employees regularly employed for seventeen (17) hours or less per week and employees employed for short periods to assist in their education program.” (26 employees in the unit). (*Having regard to the agreement of the parties*).

**1479-76-R:** Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Ken-Ex Structures Ltd. (Respondent).

Unit: “all construction labourers, ironworkers and ironworkers’ apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*clarity note* – see Report of full decision [1976] OLRB REP. DECEMBER).

**1493-76-R:** Lake Ontario District Council, on behalf of Locals 397, 572, 1071, 1450 of The United Brotherhood of Carpenters and Joiners of America (Applicant) v. D. R. Crawford Construction Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Counties of Peterborough, Victoria and the Provisional County of Haliburton, save and except non-working foremen and persons above the rank of non-working foreman.” (9 employees in the unit).

**1494-76-R:** Canadian Union of Public Employees (Applicant) v. The Lennox and Addington County Board of Education (Respondent) v. Group of Employees (Objectors).

Unit: “all office, clerical and technical employees of the respondent save and except Director of Education, Business Administrator, Supervisor of Plant and Maintenance, Superintendent of Schools, Controller, Purchasing Agent, Manager of Auxilliary Services, Co-ordinator of Community Education, Payroll Officer, Attendance Counsellor, Foreman of Custodial Services, Foreman of Maintenance, Teacher Aides, Secretaries to Director of Education, Business Administrator, Superintendent of Schools, Supervisor of Plant and Maintenance and persons covered by a subsisting collective agreement with Canadian Union of Public Employees, Local 1558.” (54 employees in the unit). (*Having regard to the agreement of the parties*).

**1497-76-R:** International Brotherhood of Electrical Workers, Local Union 339 (Applicant) v. The Hydro Electric Commission of Thunder Bay (Respondent).

Unit: “all employees of The Hydro Electric Commission of Thunder Bay employed as Stationary Engineers, building maintenance employees and cleaning and janitorial staff, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods or in a co-operative work study programme and persons covered by subsisting collective agreements.” (10 employees in the unit). (*Having regard to the agreement of the parties*).

**1499-76-R:** Retail Clerks Union, Local 206 (Applicant) v. Budget Car Rentals Toronto Limited (Respondent).

Unit: "all bus drivers employed by the respondent at Mississauga, Ontario, save and except supervisors and persons above the rank of supervisor." (6 employees in the unit).

**1501-76-R:** Labourers' Union Local 1267 Oil and Gas Technicians, Service, Domestic & General Workers (Applicant) v. Munison Ltd. (Respondent).

Unit: "all employees of the respondent working in and out of the Town of Newcastle, Ontario, save and except foremen, persons above the rank of foreman, office staff, salesmen and persons regularly employed for not more than 24 hours per week." (8 employees in the unit).

**1514-76-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Ottawa Beef Company Limited (Respondent).

Unit: "all employees of the respondent working at or out of Ottawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (37 employees in the unit).

**1532-76-R:** Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Western Dispatch Inc. operating as Western Dispatch Company (Respondent).

Unit: "all employees of the respondent working at or out of Hamilton, save and except dispatchers, persons above the rank of dispatcher, office and sales staff." (16 employees in the unit).

**1538-76-R:** Amalgamated Clothing and Textile Workers Union Toronto Joint Board (Applicant) v. J. E. Wiegand and Company Limited (Respondent).

Unit: "all employees of the respondent in Hamilton, Ontario save and except supervisors, persons above the rank of supervisor, office and sales staff, designers, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement ." (3 employees in the unit). (*Having regard to the agreement of the parties*).

**1543-76-R:** Service Employees Union, Local 204, Affiliated with AFL-CIO-C.L.C. (Applicant) v. Extendicare Ltd. (Respondent).

Unit: "all employees of the respondent at its nursing home in St. Catharines who are regularly employed for not more than twenty-four hours per week, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff and persons covered by subsisting collective agreements." (54 employees in the unit).

**1552-76-R:** International Union of Operating Engineers Local 796 (Applicant) v. Olympia & York Developments Limited (Respondent).

Unit: "all mechanical maintenance employees engaged in maintenance services and plant operations at Olympia & York Developments Limited, L'Esplanade Laurier Building, Ottawa, engaged in the maintenance and operating services, save and except Assistant Superintendent, persons above the rank of Assistant Superintendent, office staff, persons regularly employed for not more than 24 hours per week and students hired for the school vacation period." (9 employees in the unit). (*Having regard to the agreement of the parties*).



**1566-76-R:** International Printing and Graphic Communication Union (Applicant) v. G.A. Mogridge Company Limited (Respondent).

Unit: "all employees of the respondent in St. Catharines, Ontario, save and except non-working foremen, persons above the rank of non-working foreman, and office and sales staff." (9 employees in the unit).

**1572-76-R:** Toronto Printing Pressmen & Assistants' Union No. 10 (Subordinate to the International Printing and Graphic Communications Union) (Applicant) v. Davis Printing Limited (Respondent) v. Graphic Arts International Union, Local No. 28-B (Intervener).

Unit: "all employees of the respondent in the Town of Markham engaged in offset preparatory operations including artists, cameramen, platemakers, film assemblers (strippers) and their apprentices, save and except foremen and persons above the rank of foreman." (6 employees in the unit).

**1576-76-R:** Service Employees Union Local 268, Affiliated with the SEIU A.F. of L., C.I.O., C.L.C. (Applicant) v. The Corporation of the Improvement District of Red Rock (Respondent).

Unit: "all employees of the respondent at Red Rock, save and except supervisors, foremen, persons above the rank of supervisor or foreman, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (7 employees in the unit).

**1579-76-R:** United Cement Lime & Gypsum Workers' International Union (Applicant) v. Ontario Pallet Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Milton, Ontario, save and except foremen and persons above the rank of foremen, and office and sales staff." (22 employees in the unit). (*Having regard to the agreement of the parties*).

**1584-76-R:** United Steelworkers of America (Applicant) v. K-Vet Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Cambridge, Ontario, save and except foremen, persons above the rank of foreman, quality control personnel, veterinarians, nutritionists, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (24 employees in the unit). (*Having regard to the agreement of the parties*).

**1587-76-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Eastern Construction Co. Ltd. (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Niagara and the County of Haldimand, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1590-76-R:** Teamsters, Chauffeurs, Warehousemen and Helpers, Local 880 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. International Harvester Company of Canada Limited Truck Sales & Service Centre (Respondent).

Unit: "all employees of the respondent at Windsor, Ontario, save and except foremen, those above the rank of foreman, office and sales staff and parts counterman." (6 employees in the unit).

**1591-76-R:** United Plant Guard Workers of America Local 1962 (Applicant) v. Etobicoke General Hospital (Respondent).

Unit: "all security guards employed by the respondent to protect the property of 89 and 101 Humber College Boulevard, Rexdale, Ontario, in Metropolitan Toronto, save and except supervisor and persons above that rank." (9 employees in the unit). (*Having regard to the agreement of the parties*).

**1608-76-R:** Labourers International Union of North America Local 837 (Applicant) v. Lucato Bros & Co Ltd. Masonry Contractors (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

### Applications Certified Subsequent to Pre-Hearing Vote

**0078-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Dean-Chandler Waterproofing Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of United States and Canada (Intervener #2).

Unit: "all Journeymen Waterproofers, Apprentices Waterproofers, Improvers and Journeymen Trainees of the Respondent engaged in Waterproofing and/or Restoration Work in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in the unit). (*clarity note* – see Report of full decision [1976] OLRB REP. DECEMBER):

Number of names of persons on revised voters list		15
Number of persons who cast ballots		15
Number of ballots marked in favour of applicant	10	
Number of ballots marked in favour of intervener #2	5	

**0080-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Armoured Floor Company Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3).

Unit: "all Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (32 employees in the unit). (*clarity note* – see Report of full decision [1976] OLRB REP. DECEMBER).

Number of names of persons on revised voters list		34
Number of persons who cast ballots		29
Number of ballots marked in favour of applicant	27	
Number of ballots marked in favour of intervener #2	2	

**0093-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Vanguard Floors Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Asso-

ciation (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2).

Unit: "all Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (38 employees in the unit). (*clarity note* – see Report of full decision [1976] OLRB REP. DECEMBER).

Number of names of persons on revised voters' list		37
Number of persons who cast ballots		24
Number of ballots marked in favour of applicant	20	
Number of ballots marked in favour of intervener #2	4	

**0125-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Western Waterproofing Company of Canada Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2).

Unit: "all Journeymen Waterproofers, Apprentices Waterproofers, Improvers and Journeymen Trainees of the Respondent engaged in Waterproofing and/or Restoration Work in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*clarity note* – see Report of full decision [1976] OLRB REP. DECEMBER).

Number of names of persons on revised voters' list		5
Number of persons who cast ballots		5
Number of ballots marked in favour of applicant	5	
Number of ballots marked in favour of intervener #2	0	

**0139-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. The Foundation Company of Canada Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons, International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3) v. Ironworkers Local 721 (Intervener #4).

Unit: "all Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*clarity note* – see Report of full decision [1976] OLRB Rep. December).

Number of names of persons on revised voters' list		2
Number of persons who cast ballots		1
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener #2	0	

**0209-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Gibraltar Floors of Canada Ltd. (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2).



Unit: "all Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (22 employees in the unit). (*clarity note* – see Report of full decision [1976] OLRB Rep. December).

Number of names of persons on revised voters' list		26
Number of persons who cast ballots	20	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	10	
Number of ballots marked in favour of intervener #2	9	

**1320-76-R:** Canadian Chemical Workers Union (Applicant) v. C.P.I. – Vampco Limited (Respondent) v. International Chemical Workers Union, Local 172 (Intervener).

Unit: "all employees of C.P.I. – Vampco (A Division of P.P.G. Industries, Canada, Limited) at 1155 Wellington Road South, in London, Ontario, save and except foremen, those above the rank of foreman, office and sales staff and plant guards." (24 employees in the unit). (*Having regard to the agreement of the parties*).

Number of persons on list as originally prepared by employer		24
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant	18	
Number of ballots marked in favour of intervener	0	

**1324-76-R:** Canadian Chemical Workers Union (Applicant) v. S.F. Lawrason & Company Limited (Respondent) v. International Chemical Workers Union, Local 552 (Intervener).

Unit: "all employees of the respondent, save and except foremen, persons above the rank of foreman, office and sales staff, chemists and chemists' assistants." (9 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant	7	
Number of ballots marked in favour of intervener	0	

**1353-76-R:** Canadian Chemical Workers Union (Applicant) v. S. F. Lawrason & Co. Ltd. (Respondent).

Unit: "all employees of the Company at Windsor, Ontario, save and except foreman, those above the rank of foreman, office and sales staff, persons employed less than 24 hours per week and student employed during the school vacation period." (4 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant	4	
Number of ballots marked in favour of intervener	0	

**1424-76-R:** United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Presland Iron & Steel Limited (Respondent).

Unit: "all employees of the respondent in the City of Kingston, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (22 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		19
Number of persons who cast ballots		17
Number of ballots marked in favour of applicant	12	
Number of ballots marked against applicant	5	

## Applications Certified Subsequent to Post-Hearing Vote

**1246-76-R:** Canadian Union of Public Employees (Applicant) v. Humber Memorial Hospital Association (Respondent).

Unit: "all office and clerical employees employed by the respondent in the Borough of York, save and except supervisors, persons above the rank of supervisor, secretaries to the following: executive director assistant executive directors, director of nursing and director or personnel; the personnel clerk, office manager, medical records librarian, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation periods and persons covered by subsisting collective agreements." (88 employees in the unit). (*clarity note* – see Report of full decision [1976] OLRB Rep. December).

Number of names of persons on list as originally prepared by employer		57
Number of persons who cast ballots		46
Number of ballots marked in favour of applicant	33	
Number of ballots marked against applicant	13	

**1359-76-R:** Millworkers Local #802 – United Brotherhood of Carpenters and Joiners of America (Applicant) v. Conklin Lumber Company Limited (Respondent).

Unit: "all employees of the respondent at 319 Dalhousie Street, Amherstburg, save and except foremen, persons above the rank of foreman, office workers engineers, caretakers, watchmen and persons covered by a subsisting collective agreement between the respondent and the applicant." (2 employees in the unit).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots		2
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener	0	

**1361-76-R:** Service Employees Union, Local 478, A.F. of L., C.I.O., C.L.C. (Applicant) v. Extendicare Ltd. (Respondent).

Unit: "all employees who are regularly employed for not more than twenty-four hours per week and all students employed during the school vacation period in the employ of the respondent in Sudbury, save and except supervisors or foremen, persons above the rank of supervisor or foreman, professional nursing staff, physiotherapists, occupational therapists, office staff and persons covered by subsisting collective agreements between the applicant and respondent and between the Ontario Nurses Association and the respondent." (52 employees in the unit).

Number of names of persons on revised voters' list		58
Number of persons who cast ballots		24
Number of ballots marked in favour of applicant	22	
Number of ballots marked against applicant	2	

**1384-76-R:** United Cement Lime & Gypsum Workers' International Union AFL-CIO-CLC (Applicant) v. Point Anne Quarry Company, A Division of Standard Industries Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit: "all employees of the respondent at its quarry at Point Anne, Ontario, save and except office and sales staff, dispatchers, foremen and persons above the rank of foreman." (18 employees in the unit).

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots		17
Number of ballots marked in favour of applicant	17	
Number of ballots marked in favour of intervener	0	

## Applications for Certification Dismissed

### No Vote Conducted

**1074-75-R:** Association of Allied Health Professionals: Ontario (Applicant) v. University Hospital of London, Ontario (Respondent) v. Civil Service Association of Ontario (Inc.) (Intervener). (49 employees).

**1030-76-R:** Association of Allied Health Professionals: Ontario (Applicant) v. St. Michael's Hospital (Respondent) v. Group of Employees (Objectors). (221 employees).

**1097-76-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tantalus Construction Company Limited (Respondent). (3 employees).

**1193-76-R:** Retail Clerks Union Local 206 (Applicant) v. Avis Transport of Canada Ltd. (Respondent). (29 employees).

**1249-76-R:** Retail Clerks Union Local 206 (Applicant) v. Avis Transport of Canada Ltd. (Respondent). (30 employees).

**1250-76-R:** Retail Clerks Union Local 206 (Applicant) v. Avis Transport of Canada Ltd. (Respondent). (33 employees).

**1284-76-R:** Retail Clerks Union Local 206 (Applicant) v. Avis Transport of Canada Ltd. (Respondent). (30 employees).

**1285-76-R:** Retail Clerks Union Local 206 (Applicant) v. Avis Transport of Canada Ltd. (Respondent). (28 employees).



**1319-76-R:** International Beverage Dispensers' and Bartenders' Union, Local 280, of the Hotel and Restaurant Employees' and Bartenders' International Union, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Mentor Hosts Limited, carrying on business as the Old Firehall Tavern (Respondent).

Unit: "all full time and part time tapmen, bartenders, beverage waiters, male and female, bar-boys and improvers in the employ of the respondent at the Old Fire Hall Tavern in Metropolitan Toronto." (16 employees in the unit).

**1401-76-R:** The York Region R.C.S.S. Board Office Employees' Association (Applicant) v. The York Region Roman Catholic Separate School Board (Respondent). (43 employees).

**1475-76-R:** Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Acklands Limited (Unapco Division) (Respondent). (25 employees).

**1554-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Bathurst Sheppard Apartments c/o New Style Developments (Respondent). (3 employees).

**1588-76-R:** Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Acklands Limited Unapco (Division) (Respondent). (25 employees).

## Certification Dismissed Subsequent to Pre-Hearing Vote

**0076-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Belmont Concrete Finishing Co. Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3).

Voting Constituence: "All Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esqueving and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees). (*clarity note* – see Report of full decision [1976] OLRB Rep. December).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots		9
Number of ballots marked in favour of applicant	4	
Number of ballots marked in favour of intervener #2	5	

**0077-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Duron Ontario Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3) v. The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Intervener #4).

Voting Constituency: "All Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esqueving and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (47 employees). (*clarity note* - see Report of full decision [1976] OLRB Rep. December).

Number of names of persons on revised voters' list		32
Number of persons who cast ballots	29	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	7	
Number of ballots marked in favour of Intervener #2	20	

**0079-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Chemello Construction Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3) v. The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of Carpenters (Intervener #4).

Voting Constituency: "All Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esqueving and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees). (*clarity note* - see Report of full decisions [1976] OLRB Rep. December).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	8	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener #2	5	

**0081-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Structural Floor Finishing Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2).

Voting Constituency: "All Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esqueving and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (20 employees). (*clarity note* - see Report of full decision [1976] OLRB Rep. December.).

Number of names of persons on revised voters' list		24
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant	8	
Number of ballots marked in favour of intervener #2	9	

**0095-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Eastern Construction Company Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3) v. The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227 and 3233 (Intervener #4) v. Ironworkers Local 721 (Intervener #5).

Voting Constituency: "All Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esqueving and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees). (*clarity note* – see Report of full decision [1976] OLRB Rep. December).

Number of names of persons on revised voters' list		11
Number of persons who cast ballots		9
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener #2	8	

**0120-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Leader Structures (Toronto) Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3) v. Ironworkers, Local 721 (Intervener #4).

Voting Constituency: "All Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esqueving and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees). (*clarity note* – see Report of full decision [1976] OLRB Rep. December).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots		1
Number of ballots marked in favour of applicant	0	
Number of ballots marked in favour of intervener #2	1	

**0137-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Ellis-Don Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3) v. Ironworkers Local 721 (Intervener #4).

Voting Constituency: "All Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esqueving and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees). (*clarity note* – see Report of full decision [1976] OLRB Rep. December).



Number of names of persons on revised voters' list		7
Number of persons who cast ballots		7
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener #2	5	

**0138-76-R:** Labourers International Union of North America, Local 183 (Applicant) v. United Floor Company Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2).

Voting Constituency: "All Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees). (*clarity note* – see Report of full decision [1976] OLRB Rep. December).

Number of names of persons on revised voters' list		8
Number of persons who cast ballots		6
Number of ballots marked in favour of applicant	0	
Number of ballots marked in favour of intervener #2	6	

**0198-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Vanbots Construction Co. Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3).

Voting Constituency: "All Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees). (*clarity note* – see Report of full decision [1976] Rep. December).

Number of names of persons on revised voters' list		4
Number of persons who cast ballots		4
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener #2	3	

**0221-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Relcon Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3).

Voting Constituency: "All Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of

non-working foreman.” (17 employees). (*clarity note* – see Report of full decision [1976] OLRB Rep. December).

Number of names of persons on revised voters' list		16
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener #2	12	

**0222-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Diplock Durable Floor Company Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3).

Voting Constituency: “All Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esqueving and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (23 employees). (*clarity note* – see Report of full decision [1976] OLRB Rep. December).

Number of names of persons on revised voters' list		23
Number of persons who cast ballots	19	
Number of ballots marked in favour of applicant	3	
Number of ballots marked in favour of intervener #2	16	

**0224-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. V. K. Mason Construction Ltd. (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3) v. Carpenters' District Council of Toronto on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 (Intervener #4).

Voting Constituency: “All Cement Masons and their Apprentices in the employ of the respondent engaged in Cement Finishing Work, in the Industrial, Commercial and Institutional Sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esqueving and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees). (*clarity note* – see Report of full decision [1976] OLRB Rep. December).

Number of names of persons on revised voters' list		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	0	
Number of ballots marked in favour of intervener #2	2	

**1392-76-R:** United Brotherhood of Carpenters and Joiners of America, Local 3054 (Applicant) v. Fleck Manufacturing Company (Respondent).

Voting Constituency: “All employees of the respondent employed at its plant in Huron Park, Ontario, save and except foremen, foreladies, persons above that rank, office and sales staff, persons regularly employed less than 24 hours per week and students employed during the school vacation period.” (113 employees).

Number of names of persons on revised voters' list		111
Number of persons who cast ballots	90	
Number of ballots marked in favour of applicant	32	
Number of ballots marked against applicant	58	

**1453-76-R:** International Woodworkers of America (Applicant) v. Silvaplex Ltd. (Respondent).

Voting Constituency: "All employees of Silvaplex Ltd., Gravenhurst, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (44 employees).

Number of names of persons on list as originally prepared by employer		44
Number of persons who cast ballots	33	
Number of ballots marked in favour of applicant	15	
Number of ballots marked against applicant	18	

### Certification Dismissed Subsequent to Post-Hearing Vote

**1006-75-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Bob Garner Construction Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all construction labourers in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all lands north thereof in the County of Ontario, save and except Non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	9	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	8	
Number of segregated ballots cast by persons whose names appear on voters' list	1	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	8	

**1105-76-R:** Retail, Wholesale and Department Store Union, AFL : CIO : CLC (Applicant) v. James Bamford & Sons Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at its warehouse operations at 3128 and 3180 Wharton Way, Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (22 employees in the unit).

Number of names of persons on revised voters' list		25
Number of persons who cast ballots	25	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	20	

**1279-76-R:** United Steelworkers of America (Applicant) v. Professional Machine and Tool Company Limited (Respondent) v. Group of Employees (Objectors).



Unit: "all employees of the respondent company in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (28 employees in the unit).

Number of names of persons on revised voters' list		24
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	17	

**1354-76-R:** Retail, Wholesale and Department Store Union, AFL-CIO-CLC (Applicant) v. Beatrice Foods (Ontario) Limited Brookside Dairy Division (Respondent) v. Group of Employees (Objectors).

Unit: "all office and clerical employees of the respondent working at Kingston, Ontario, save and except office manager, persons above the rank of office manager, secretary to the general manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (12 employees in the unit).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	11	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	8	
Number of segregated ballots cast by persons whose names do not appear on voters' list	3	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	5	

**1417-76-R:** International Molders & Allied Workers Union (Applicant) v. Kanmet Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and laboratory employees of the respondent in its office and plant at Cambridge, Ontario, save and except foremen and supervisors, persons above the rank of foreman and supervisor, confidential secretary to the general manager, and persons covered by a subsisting collective agreement between the respondent and the International Molders & Allied Workers Union, Local No. 194." (15 employees in the unit).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	10	

### Applications for Certification Withdrawn

**0873-76-R:** Local Union 304, Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Jordan Wines Limited (Respondent). (11 employees).

**1085-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Valentine Developments Limited (Respondent). (3 employees).

**1404-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Jovin Contracting Ltd. (Respondent). (4 employees).

**1434-76-R:** Service Employees Union Local 268 Affiliated with the SEIU of A.F. of L., C.I.O. C.L.C. (Applicant) v. The General Hospital of Port Arthur (Respondent). (43 employees).

**1450-76-R:** Canadian Union of Labour Specialties (Applicant) v. Canadian Labour Congress (Respondent). (32 employees).

**1455-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. S. B. McLaughlin Associates Limited (Respondent). (7 employees).

**1458-76-R:** Employees Association of Dug N' Rob Ltd. Per Debbie MacDonald and Suzanne St. Louis (Applicant) v. Dug N' Rob Ltd. (Respondent). (34 employees).

**1472-76-R:** Christian Labour Association of Canada (Applicant) v. Merry Hill Nursing Homes Ltd. (Respondent). (53 employees).

**1505-76-R:** Lumber and Sawmill Workers' Union Local 2693 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Link Steel Enterprises Ltd. (Respondent). (2 employees).

**1533-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Applehill Investments Ltd. (Respondent). (3 employees).

**1553-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. W. J. Reatly Management (Respondent). (2 employees).

**1571-76-R:** The Millwright District Council of Ontario on behalf of Locals 38, 494, 1410, 1425, 1592, 1669, 1916 and 2309 (Applicant) v. Miller Bros. Co. 1962 (Respondent) v. Canadian Paperworkers Union – Local 1489 (Intervener #1) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local Union 721 (Intervener #2). (4 employees).

**1575-76-R:** The International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Jen-Mar Construction Limited (Respondent). (5 employees).

**1605-76-R:** Teamsters Union Local 879, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Atomic Interprovincial Transport (Eastern) Ltd. (Respondent). (11 employees).

**1625-76-R:** Service Employees Union, Local 478, Affiliated with Service Employees International Union, A.F. of L., C.I.O., C.L.C. (Applicant) v. VS Services Ltd. (Respondent). (51 employees).

**1626-76-R:** International Brotherhood of Electrical Workers Local Union 586 – Ottawa (Applicant) v. Lorne's Electric (Respondent). (8 employees).

## Applications for Declaration Terminating Bargaining Rights

**0890-76-R:** Alfred Herniman (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Twin Pines Dairy Co. Ltd. (Intervener). (3 employees). (*Dismissed*).

**1064-76-R:** Jim Baxendale & a Group of Employees (Applicants) v. Teamsters' Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Respondent) v. Armbro Materials & Construction Ltd. (Intervener). (*Granted*).

Unit: "all employees of Armbro Materials & Construction Ltd. engaged in the aggregate production operation of the respondent pit in Caledon Township, save and except foremen and dispatchers, persons above the rank of foremen and dispatcher, laboratory technicians, office and sales staff, students employed during the school vacation period and persons covered by a subsisting collective agreement." (63 employees in the unit).

Number of names of persons on list as originally prepared by employer		59
Number of persons who cast ballots	38	
Number of spoiled ballots	1	
Number of ballots marked in favour of respondent	6	
Number of ballots marked against respondent	31	

**1124-76-R:** Eric Woods (Applicant) v. Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. George F. Pettinos (Canada) Limited (Intervener). (*Terminated*).

Unit: "all employees of George F. Pettinos (Canada) Limited working at and out of Hamilton, save and except foremen, dispatchers, persons above the rank of foreman and dispatcher, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (12 employees in the unit).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	8	

**1141-76-R:** William Bauer, et al (Applicants) v. Canadian Union of Public Employees, Local 32 (Respondent). (*Granted*).

Unit: "all employees save and except foreman, and persons above the ranks of foreman, office staff, summer students, and persons regularly employed for not more than 24 hours per week." (9 employees in the unit).

Number of names of person on list as originally prepared by employer		9
Number of persons who cast ballots	8	
Number of ballots marked in favour of Respondent	3	
Number of ballots marked against Respondent	5	



**1381-76-R:** E. Anne Alaouze, President Local 569, Unit – Oakville-Trafalgar Hospital acting on behalf of the employees described in paragraph 3 (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Oakville-Trafalgar Memorial Hospital Association (Intervener). (30 employees). (*Terminated*).

**1541-76-R:** Sidney Brenner (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Catalano Produce Limited (Intervener). (9 employees). (*Withdrawn*).

**1581-76-R:** Livingston Industries Employees (Applicant) v. International Woodworkers of America, Local 2-89 (Respondent) v. Livingston Industries Limited (at its London operation) (Intervener). (105 employees). (*Withdrawn*).

### **Applications For Declaration of Successor Status**

**1042-76-R:** Canadian Union of Public Employees (Applicant) v. Dufferin-Peel Roman Catholic Separate School Board Office Employees Association (Respondent Trade Union) v. The Dufferin-Peel Roman Catholic Separate School Board (Respondent Employer). (*Dismissed*).

**1464-76-R:** Local Union 636 of the International Brotherhood of Electrical Workers (Applicant) v. The Public Utility Commission of the City of Woodstock (Respondent). (*Granted*).

**1465-76-R:** Local 636 International Brotherhood of Electrical Workers (Applicant) v. The Public Utilities Commission of Galt of the Corporation of the City of Cambridge (Respondent). (*Granted*).

**1468-76-R:** Local 636 International Brotherhood of Electrical Workers (Applicant) v. The Public Utilities Commission of the City of Kitchener (Respondent). (*Granted*).

**1469-76-R:** Local 636 – International Brotherhood of Electrical Workers (Applicant) v. The Corporation of the City of Kitchener (Respondent). (*Granted*).

**1470-76-R:** Local Union 636 of the International Brotherhood of Electrical Workers (Applicant) v. The Hydro-Electric Commission of Hespeler of the Corporation of the City of Cambridge (Respondent). (*Granted*).

**1471-76-R:** Local 636 – International Brotherhood of Electrical Workers (Applicant) v. The Town of Elmira Public Utilities Commission (Respondent). (*Granted*).

**1481-76-R:** Heatex Employees Union Local 1686, C.L.C. (Applicant) v. Heatex Employees Association (Respondent). (*Granted*).

**1506-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. The Public Utilities Commission of the City of St. Catharines (Respondent). (*Granted*).

**1509-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. The Port Colborne Hydro-Electric Commission (Respondent). (*Granted*).

**1510-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. The Hydro Electric Commission of Welland (Respondent). (*Granted*).

**1511-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. The Chippewa Public Utility Commission (Respondent). (*Granted*).

### **Applications For Declaration That Strike Unlawful**

**1759-75-M:** Ontario Public Service Employees Union (Applicant) v. Sheridan College of Applied Arts and Technology (Respondent). (*Granted*).

**1237-76-U:** Consolidated Bathurst Packaging Limited (applicant) v. International Woodworkers of America and Local 2-337 and William Barton, et al (Respondents). (*Dismissed*).

### **Applications For Consent to Prosecute**

**0981-76-U:** Labourers' International Union of North America, Local 183 (Applicant) v. Arisco Investments Limited and Joseph Rubin (respondents). (*Dismissed*).

**1351-76-U:** Association of Allied Health Professionals: Ontario (Applicant) v. the Salvation Army Grace Hospital (Respondent).

- and -

**1352-76-U:** Association of Allied Health Professionals: Ontario (Applicant) v. The Salvation Army Grace Hospital (Respondent). (*Withdrawn*).

### **Complaints Under Section 79 (Unfair Labour Practice)**

**0627-76-U:** United Steelworkers of America (Complainant) v. Rema Tip Top Rubber Division of CBM Services Ltd. (Respondent). (*Granted*).

**0751-76-U:** Communications Workers of Canada (Complainant) v. A.A.S. Telecommunications Ltd. and Zipcall Ltd. (Respondents)

- and -

**1037-76-U:** Communications Workers of Canada (Complainant) v. A.A.S. Telecommunications Ltd. and Zipcall Ltd. (Respondents)

- and -

**1161-76-U:** Communications Workers of Canada, C.L.C. (Complainant) v. A.A.S. Telecommunications Ltd. and Zipcall Ltd. (Respondents). (*Dismissed*).

**1127-76-U** Paul Stuckey (Complainant) v. Local 1967 of the International Union United Automobile Aerospace and Agricultural Implement Workers of America (UAW-CLC) Douglas Aircraft Company of Canada Ltd. (Respondents). (*Dismissed*).

**1177-76-U:** United Plant Guard Workers, Local 1962 (Complainant) v. Allied Investigation and Security Limited (Respondent). (*Withdrawn*).

**1218-76-U:** Joseph James Bornais (Complainant) v. The Windsor Construction Association Fantin Crane Co. Ltd. (Respondent). (*Withdrawn*).

**1235-76-U:** Federation of Community Agencies Staff Association (Complainant) v. Browndale (Ontario) Haliburton Region (respondent). (*Withdrawn*).

**1257-76-U:** Upholsterers International Union of North America, AFL/CIO (Complainant) v. Craftique Originals Ltd. (Respondent). (*Withdrawn*).

**1385-76-U:** Sheet Metal Workers' International Association Local Union 540 (Complainant) v. Kraemer Tool & Mfg. Company Ltd. (Respondent). (*Withdrawn*).

**1393-76-U:** Upholsterers International Union of North America AFL/CIO (Complainant) v. Craft-line Industries Limited (Respondent). (*Withdrawn*).

**1400-76-U:** United Steelworkers of America (Complainant) v. Indalloy – Division of Indal Limited (Respondent). (*Withdrawn*).

**1436-76-U:** Canadian Chemical Workers Union (Complainant) v. Canadian Pittsburgh Industries a Division of P.P.G. Industries Canada Ltd. (London Mirror Fabrication Plant) (Respondent). (*Withdrawn*).

**1439-76-U:** Teamsters Local 91 (Complainant) v. Willson Office Specialty Limited (Respondent). (*Withdrawn*).

**1440-76-U:** Canadian Union of Public Employees (Complainant) v. Chatelaine Villa Nursing Home (Respondent). (*Withdrawn*).

**1463-76-U:** Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Drummond, McCall & Co. Ltd. (Respondent). (*Withdrawn*).

**1478-76-U:** Ralph Sevigny (Complainant) v. Teamsters, Chauffeurs, Warehousemen and Helpers of America – Local 141 – London, Ontario (Respondent). (*Withdrawn*).

**1512-76-U:** Service Employees Union – Local 210 Affiliated with Service Employees International Union, AFL-CIO-CLC (Complainant) v. Essex Golf and Country Golf (Respondent). (*Withdrawn*).

**1536-76-U:** Retail Clerks Union, Local 206 (Complainant) v. Budget Car Rentals Toronto Limited (Respondent). (*Withdrawn*).

**1542-76-U:** United Cement Lime and Gypsum Workers International Union (Complainant) v. Oaks Precast Industries Ltd. Div. of Standard Industries (Respondent). (*Withdrawn*).

**1549-76-U:** Optical & Plastic Technicians & Allied Workmens Union Local 67 (Complainant) v. Central Optical Inc. (respondent). (*Withdrawn*).



**1562-76-U:** United Steelworkers of America (Complainant) v. Store Metals Limited (Respondent). (*Withdrawn*).

**1574-76-U:** Retail Clerks Union, Local 206 (Complainant) v. Budget Car Rentals Toronto Limited (Respondent). (*Withdrawn*).

**1619-76-U:** London and District Service Workers' Union, Local 220, S.E.I.U. (Complainant) v. Willson Nursing Home Ltd., Employer and Person or Persons employed by Employer (Respondents). (*Withdrawn*).

### **Application Under Section 39**

**1460-76-R:** Reginald Stanley Harcourt (Applicant) v. The Canadian Union of Public Employees Local 1749 (Respondent Trade Union) v. The Board of Education for the Borough of York (Respondent Employer). (*Dismissed*).

### **Applications Under Section 55**

**1041-76-R:** Kay Stratigeas (Applicant) v. Canadian Union of Blind and Sighted Merchants, Local 681, S.E.I.U. – A.F.L. – C.I.O. – C.L.C. (Respondent). (*Granted*).

**1309-76-R:** International Union of Electrical, Radio and Machine Workers, and its Local 566 (Applicant) v. Carl Wilson Industries Ltd. (respondent). (*Withdrawn*).

**1490-76-R:** Graphic Arts International Union, Local 542 (Applicant) v. Carton and Diecraft Limited and Atlas Paperboard Boxes (Respondent) v. Atlas Paperboard Boxes (Intervener). (*Granted*).

### **Application Under Section 76 (Financial Statement Requested by Trade Union Member)**

**1332-76-M:** Gerry M. Van Rijt (Complainant) v. D. Helmer, President Local 523, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (Respondent). (*Terminated*)

### **Jurisdictional Dispute**

**1733-75-JD:** The Ontario Precast Concrete Manufacturers' Association on behalf of Artex Precast Limited (Complainant) v. Local Union No. 38, United Brotherhood of Carpenters and Joiners of America, and Labourers' International Union of North America, Ontario Provincial District Council, by and on behalf of Locals 506, and 837, and Poole Construction Limited (respondents). (*Direction*).

## References to Board Pursuant to Section 96

**1086-76-M:** W. Stratigeas, Successor to C.N.I.B. Cater Plan Services (Employer) v. Canadian Union of Blind and Sighted Merchants, Local 681, SEIU-AFL-CIO-CLC (Trade Union). (*Granted*).

**1195-76-M:** Robertson Building Systems Ltd. (Employer) v. United Steelworkers of America, Local 4166 (Trade Union). (*Terminated*).

**1198-76-M:** Trizec Equities Limited (Employer) v. Service Employees Union, Local 204, AFL-CIO-CLC (Trade Union). (*Terminated*).

**1199-76-M:** Chateau-Gai Wines Ltd. (Employer) v. Local 304-Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Trade Union). (*Terminated*).

## Applications Under Section 112A

**0617-76-M:** Local Union 71 of the United association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Arial Plumbing and Heating Limited, and The Mechanical Contractors Association of Ottawa (Respondents). (*Granted*).

**0881-76-M:** Dover Corporation (Canada) Limited (Applicant) v. International Union of Elevator Constructors, Local 90 (Respondent)

- and -

**0883-76-M:** Dover Corporation (Canada) Limited (Applicant) v. International Union of Elevator Constructors, Local 90 (Respondent)

- and -

**0884-76-M:** Dover Corporation (Canada) Limited (Applicant) v. International Union of Elevator Constructors, Local 90 (Respondent).

**0885-76-M:** Dover Corporation (Canada) Limited (Applicant) v. International Union of Elevator Constructors, Local 90 (Respondent). (*Dismissed*).

**1425-76-M:** Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 598 (Applicant) v. Relcon Limited (Respondent). (*Withdrawn*).

**1426-76-M:** International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Stacey Electric Company Limited and Electrical Contractors Association of Toronto (Respondents). (*Withdrawn*).

**1433-76-M:** United Brotherhood of Carpenters and Joiners of America, Local (Applicant) v. Stephens & Bass Limited (Respondent). (*Withdrawn*).

**1446-76-M:** International Union of Operating Engineers, Local 793 (Applicant) v. A. Cope & Sons Limited (Respondent). (*Dismissed*).

**1484-76-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Slater Forming Limited (carrying on business under the name of Keldor Forming (Ontario) Limited) (Respondent). (*Withdrawn*).

**1485-76-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Baxter Crane Service (Respondent). (*Withdrawn*).

**1523-76-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Bellatrix Construction (Respondent). (*Granted*).

**1550-76-M:** Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. The Labour Bureau of the Painting and Decorating Contractors of Ontario; Standard Painting and Decorating Ltd. (Respondents). (*Withdrawn*).

**1556-76-M:** Labourers' International Union of North America, Local 527 (Applicant) v. Fortin Enterprises (Respondent). (*Withdrawn*).

**1563-76-M:** Labourers' International Union of North America, Local 527 (Applicant) v. Shameran Forming Company Limited (Respondent). (*Withdrawn*).

**1569-76-M:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Nickel City Plastering Ltd. (Respondent). (*Withdrawn*).

**1586-76-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Action Crane Limited & Kosar Properties Limited (Respondents). (*Withdrawn*).

**1599-76-M:** United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada Local Union 508 (Applicant) v. Wilputte Canada Ltd. (Respondent). (*Withdrawn*).

**1600-76-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. City View Flooring Company Ltd. (Respondent). (*Withdrawn*).

**1614-76-M:** Labourers' International Union of North America, Local 527 (Applicant) v. City View Flooring Company Limitd (Respondent). (*Withdrawn*).

**1624-76-M:** Grand River Valley District Council of United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Applicant) v. General Contractors Section of the Grand Valley Construction Association and Transway Steel Buildings Limitd (Respondents). (*Withdrawn*).

**1629-76-M:** Labourers' International Union of North America, Local 506 (Applicant) v. The General Contractors Section of the Toronto Construction Association and Van Bots Construction (Respondent). (*Withdrawn*).

**1640-76-M:** International Union of Operating Engineers, Local 793 (Applicant) v. The Lummus Company Canada Limited (Respondent). (*Withdrawn*).



**1658-76-M:** Labourers' International Union of North America, Local 527 (Applicant) v. Mount-Royal Concrete Floor (Canada) Limited and The Ottawa Construction Association (Respondents). (*Withdrawn*).

### Applications For Reconsideration of Board's Decision

**1828-75-R:** Teamsters Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. N. J. Spivak Limited (Respondent) v. Group of Employees (Objectors). (*Request Denied*).

**0779-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. ARSCO Investments Ltd. (respondent). (*Request Denied*).

**1402-76-R:** Tobacco Workers' International Union (Applicant) v. Imperial Leaf Tobacco Company of Canada Limited (Respondent) v. Canadian Chemical Workers Union (Intervener). (*Request Denied*).

**1188-76-U:** John P. Tryfiak and Richard Berry (Complainants) v. International Union of Operating Engineers, Local 793 (Respondent) v. Arthur G. McKee and Company of Canada Limited (Intervener). (*Section 79*). (*Request Denied*).

**0092-76-M:** International Union of Elevator Constructors, Local 90 (Applicant) v. Canadian Elevator Manufacturers' Association, more particularly, Otis Elevator Company Limited (Respondent)  
- and -

**0093-76-M:** International Union of Elevator Constructors, Local 90 (Applicant) v. Canadian Elevator Manufacturers Association and more particularly, Dover Corporation (Canada) Limited (Respondent)

- and -

**1023-76-M:** International Union of Elevator Constructors, Local 90 (Applicant) v. Canadian Elevator Manufacturers' Association (respondent). (*Section 112a*). (*Request Denied*).

**0242-76-M:** International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. The Electrical Power Systems Construction Association (Respondent). (*Request Denied*).

# **STATISTICAL TABLES 3RD QUARTER AND 1ST 9 MONTHS OF FISCAL YEAR 197 -7**

**TABLE I**

## **APPLICATIONS AND COMPLAINTS FILED WITH THE ONTARIO LABOUR RELATIONS BOARD**

	Number Filed		
	3rd Quarter Fiscal Year	1st 9 Months Fiscal Year	
	1976-77	1976-77	1975-76
I. Certification	260	809	903
II. Declaration Terminating Bargaining Rights	23	60	47
III. Declaration of Successor Status	24	37	39
IV. Declaration that Strike Unlawful	18	84	84
V. Declaration that Lock-Out Unlawful	3	6	1
VI. Consent to Prosecute	14	70	114
VII. Complaint of Unfair Practice in Employment (Section 79)	105	340	217
VIII. Miscellaneous	109	304	115
TOTAL	<u>556</u>	<u>1710</u>	<u>1510</u>

**TABLE II**

## **HEARINGS OF THE ONTARIO LABOUR RELATIONS BOARD**

	Number		
	3rd Quarter Fiscal Year	1st 9 Months Fiscal Year	
	1976-77	1976-77	1975-76
Hearings and Continuation of Hearings by the Board	391	1141	1035

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October to December.

TABLE III

**APPLICATIONS AND COMPLAINTS DISPOSED OF  
BY THE ONTARIO LABOUR RELATIONS BOARD BY MAJOR TYPES**

	Number Disposed of		
	3rd Quarter Fiscal Year 1976-77	1st 9 Months Fiscal Year	
		1976-77	1975-76
I. Certification	275	813	946
II. Declaration Terminating Bargaining Rights	16	48	45
III. Declaration of Successor Status	13	22	19
IV. Declaration that Strike Unlawful	15	49	67
V. Declaration that Lock-Out Unlawful	2	6	—
VI. Consent to Prosecute	9	54	85
VII. Complaint of Unfair Practice in Employment (Section 79)	83	294	198
VIII. Miscellaneous	69	212	97
	—	—	—
TOTAL	482	1498	1457
	==	==	==



**TABLE IV**

**APPLICATIONS DISPOSED OF  
BY THE ONTARIO LABOUR RELATIONS BOARD  
BY TYPE AND DISPOSITION**

		Number of Applications			Number of Employees*		
		3rd Quarter Fiscal Year	1st 9 Mths. F.Y.		3rd Quarter Fiscal Year	1st 9 Mths. F.Y.	
		1976-77	1976-77	1975-76	1976-77	1976-77	1975-76
<b>I. Certification</b>							
Granted		172	546	619	4254	14871	22962
Dismissed		57	146	188	2285	5645	8369
Withdrawn		46	121	139	1047	2560	2961
	<b>TOTAL</b>	275	813	946	7586	23076	34292
<b>II. Termination of Bargaining Rights</b>							
Granted		3	17	26	88	397	454
Dismissed		10	24	17	246	893	394
Withdrawn		3	7	2	187	287	339
	<b>TOTAL</b>	16	48	45	521	1577	1187

\*These figures refer to the number of employees directly affected and are based on the number of employees in the bargaining units at the time the applications for certification were filed with the Board. Totals for applications dismissed and withdrawn are approximate.

**TABLE IV**  
**APPLICATIONS DISPOSED OF**  
**BY THE ONTARIO LABOUR RELATIONS BOARD**  
**BY TYPE AND DISPOSITION (CONTINUED)**

		Number of Applications		
		3rd Quarter Fiscal Year 1976-77	1st 9 Months Fiscal Year	
			1976-77	1975-76
III.	Declaration that Strike Unlawful			
	Granted	6	21	31
	Dismissed	1	5	12
	Withdrawn	8	23	24
	TOTAL	<u>15</u>	<u>49</u>	<u>67</u>
IV.	Declaration that Lock-Out Unlawful			
	Granted	—	2	—
	Dismissed	1	2	—
	Withdrawn	1	2	—
	TOTAL	<u>2</u>	<u>6</u>	<u>—</u>
V.	Consent to Prosecute			
	Granted	1	3	11
	Dismissed	1	8	13
	Withdrawn	7	43	61
	TOTAL	<u>9</u>	<u>54</u>	<u>85</u>
VI.	Complaint of Unfair Practice in Employment (Section 79)			
	Granted	12	33	15
	Dismissed	17	58	50
	Withdrawn	54	203	133
	TOTAL	<u>83</u>	<u>294</u>	<u>198</u>

**TABLE V**

**REPRESENTATION VOTES IN CERTIFICATION APPLICATIONS  
DISPOSED OF  
BY THE ONTARIO LABOUR RELATIONS BOARD**

	Number of Applications		
	3rd Quarter Fiscal Year 1976-77	1st 9 Months Fiscal Year	
		1976-77	1975-76
Certification after Vote*			
Pre-hearing Vote	17	43	44
Post-hearing Vote	8	23	58
Ballots not Counted	—	—	1
Dismissed after Vote			
Pre-hearing Vote	15	32	29
Post-hearing Vote	11	28	40
Ballots not Counted	—	2	1
<b>TOTAL</b>	<b>51</b>	<b>128</b>	<b>173</b>

\*Includes applicant-intervener applications in which both applicant and intervener apply for a new unit and either applicant or intervener is certified.

**TABLE VI**

**REPRESENTATION VOTES IN TERMINATION APPLICANTS  
DISPOSED OF  
BY THE ONTARIO LABOUR RELATIONS BOARD**

	Number of Votes		
	3rd Quarter Fiscal Year 1976-77	1st 9 Months Fiscal Year	
		1976-77	1975-76
*Respondent Union Successful	3	4	3
Respondent Union Unsuccessful	3	15	20
<b>TOTAL</b>	<b>6</b>	<b>19</b>	<b>23</b>

\*In Termination Proceedings where a vote is taken the applicant is a group of employees or the employer; the incumbent union is thus the respondent.

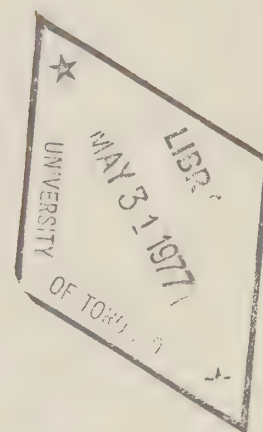




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**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1977] OLRB REP.**

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**1348-76-R** Canadian Union of Industrial Employees, (Applicant), v. **Emanuel Products Limited**, (Respondent), v. International Woodworkers of America, (Intervener).

**Certification – Pre-Hearing Vote – Membership Evidence – Whether membership evidence defective – Effect of defective membership evidence.**

**BEFORE:** Mr. M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and H. Simon.

**APPEARANCES:** *Brian Iler and Peter Dorfman for the applicant; no one for the respondent; H. Goldblatt and J. C. Horan for the intervener.*

**DECISION OF THE BOARD:** February 2, 1977

1. Pursuant to a Board order dated November 23, 1976, the pre-hearing vote in this application for certification was taken and the ballot box was sealed. A hearing was then convened to inquire into the quality of the membership evidence submitted, in view of the allegations made by the intervener and the subsequent investigation of the Board.

2. The jurisdiction of this Board to order a pre-hearing vote depends on the finding, based on sufficient evidence, that the applicant has as members not less than 35% of the employees in the given voting constituency. The issue in this case is whether the documentary membership evidence submitted to establish that fact is sufficiently reliable to allow the ordering of the vote.

3. Because of the Board's policy, pursuant to sections 100(1) and 92(2)(j) of The Labour Relations Act to assure, insofar as possible, the confidentiality of union membership, it normally relies in certification proceedings on a form of hearsay evidence to establish the applicant's membership strength. That evidence is usually in the form of membership application cards supported by the written declaration (Form 8) of a person with direct knowledge of their reliability. (See section 48 of the Board's Rules of Procedure). Since such evidence is not, in the normal course of proceedings, shown to the respondent and therefore cross examination as to its truth is not available to the parties, the Board has consistently demanded a high standard of integrity in all such documentary evidence. The required standard and the consequences that flow from deviation from the standard were well articulated in *Webster Air Equipment Company Ltd* 58 CLLC ¶18,110 and *International Nickel Company of Canada Limited* [1966] OLRB Rep. Jan. 698 at 730. Where a union officer knowingly submits a defective application card or a false declaration on Form 8, the Board may conclude that it cannot rely on any of the evidence submitted by the union. The same may be true where laxity, and not a deliberate intention to defraud, was the reason for a union officer submitting defective documents. Where irregularities are found in cards collected and submitted by a rank and file union member, the Board may reject the defective cards or it may reject all of the cards gathered by that particular collector, while still relying on the remainder of the cards submitted. Where, however, a widespread pattern of irregularities is shown to have occurred among rank and file collectors the Board may refuse to rely on the remainder of the cards out of a reasonable concern that similar practices may have been engaged in by other persons. The Board may then infer that those responsible for the organizing campaign have so failed in their responsibilities of supervision that no evidentiary value can be given to any of the documentary material filed.



4. While in this case a considerable amount of evidence was adduced the Board does not consider it necessary to review all of the facts in detail. The Board heard the testimony of seven employees in the proposed bargaining unit as well as from Mr. Peter Dorfman, the President of the applicant union, who was the supervisor of the campaign and the Form 8 declarant in the instant case. Serious conflicts emerged between the testimony of Mr. Dorfman and the testimony of two of the collectors, Arnaldo Tarantino and Jack Monteleone.

5. In the Form 8 declaration Mr. Dorfman disclosed that he could not vouch for the reliability of some 5 of the 140 cards submitted. He testified that the cards in question had been handled by the collector Eva Roberts and that he had been unable to obtain any confirmation from her as to their regularity. He testified further that only after notice of the Board's inquiry into the quality of the cards was received was he told by Arnaldo Tarantino that some seven other cards which he had collected, and which had been submitted to the Board, could not be confirmed as to their reliability, and by Jack Monteleone that two or three of the cards he collected which were also submitted to the Board, were doubtful. Arnaldo Tarantino collected upwards of twenty cards and Mr. Monteleone sixty-five. It appeared that neither could identify from the names on the cards they returned to Mr. Dorfman which were the doubtful ones. The irregularity in all of these instances is either that the person who signed as a witness to the applicant's signature on the application portion of the card did not in fact witness the signing of the card or that the person who signed the receipt portion of the card was not in fact the person who received the payment of the \$1.00 initiation fee from the applicant. There is no direct evidence that any card is tainted as being either a "non sign" or "non pay".

6. The evidence of both collectors is that they advised Mr. Dorfman of the existence of doubtful cards among those they collected at a much earlier date than he says. They testified that they drew to his attention the fact that some of their cards were incorrect or doubtful on the evening of October 5, 1976, when they returned all of the collected cards to Mr. Dorfman at the union's office. That is before Mr. Dorfman filed the application. Counsel for the applicant suggested two alternative theories to explain the contradiction between the collectors and Mr. Dorfman; firstly, that the two collectors perjured themselves before the Board in order to escape any blame for aborting this application; secondly, that in view of their own inexperience, the use of a translator at the hearing and the intimidating atmosphere of the Board's hearing, they were confused as to the process they were involved in and mistaken in their testimony.

7. Having observed the witnesses and noting the consistency of their evidence and that of Carmen Tarantino respecting the number of persons present and the events on the evening of October 5, 1976, at the union's office, and the vagueness of the recollection of Mr. Dorfman as to that event, we are inclined to discount the second theory. We note as well that, notwithstanding prolonged and laborious questioning of counsel for the applicant, Arnaldo Tarantino and Jack Monteleone did not contradict themselves on matters of essential evidence. As to the first theory, counsel's suggestion that these collectors are perjurers is, to say the least, problematic. He would have us view them as dishonest insofar as they disagree with the union president but reliable insofar as their membership evidence in support of the union is concerned.

8. Having regard to the totality of the evidence and particularly to the manner in which cards were gathered as disclosed in the evidence of Nevenka Kasic, Eva Roberts, Gemma Sapiano as well as the collectors Arnaldo Tarantino and Jack Monteleone we find that we cannot give any weight to any of the cards handled by Eva Roberts or collected by Arnaldo Tarantino and Jack Monteleone. Their actions and testimony demonstrate a fundamental misunderstanding of the meaning of the documents they circulated and collected. The refusal to give any weight to those cards reduces the application's strength to below the necessary 35%.

9. It makes no difference that the Board's doubts about the probative weight of these cards were raised by irregularities not specifically relating to the failure of individual applicants to sign the cards or pay the initiation fee (*Collingwood Shipyards, Division of Canadian Shipbuilding and Engineering Ltd.* 67 CLLC. 16,017). It does not lie in the mouth of the union to say, as it does, that the irregularities disclosed should not affect the merits of its application since witnessed signatures on applications and collector's signatures on receipts are not strictly required by the Board anyway, and so need not have been provided in the first place. Firstly, it would be more accurate to say that an applicant that does not provide witnessed application cards and receipts signed by the collector and countersigned by the applicant does so at its peril. (See *The City of Windsor* (1953), 53 CLLC 17, 050; *Kennametal Tools & Manufacturing Co. Limited* [1963] OLRB Rep. Nov. 422; *International Nickel Company of Canada Limited* [1966] OLRB Rep. Jan. 698; *Sterling Tile Company* [1970] OLRB Rep. Feb. 1346; *B. Moscone Tile Co. Ltd.* [1970] Rep. Apr. 44; *Mercury Terrazzo Limited* [1970] OLRB Rep. June 291; *Williams Machines Limited* [1972] OLRB Rep. Oct. 869; *W & H Voortman Limited* [1975] OLRB Rep. Aug. 605; *Leon's Furniture Limited* (unreported) Board File No. 0831-75-R, October 22, 1975.) Secondly, it should be noted that Form 8 contains the following:

3. "(Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:"

In the instant case Mr. Dorfman's declaration in that respect was false.

10. The primary issue in any certification proceeding is the ability of the Board to rely on the documentary evidence filed. When a union has chosen to provide the certainty of witnessed signatures and signed receipts to bolster the integrity of its evidence and has, whether through carelessness or design, misled the Board in that regard, there may be raised in the Board's mind doubts as to the entire credibility of the applicant's documentary evidence. Having regard to the strict standards of integrity required of such evidence, the Board may, in such circumstances and having regard to all of the evidence, reasonably re-

fuse to attach any probative value whatsoever to any of the cards or to the Form 8 declaration filed in support of the application.

11. The Form 8 declaration plays a central role in the certification process. It serves a dual purpose, in that it provides the Board with further evidence in support of the cards filed other than *viva voce* evidence of a union officer that was required prior to the introduction of the form in 1960, and forces a measure of responsible supervision upon the sponsor of the application. A deficiency in the Form 8 declaration is therefore seen as going to the root of the application and may result in its dismissal. (*Collingwood Shipyards, supra*).

12. In the instant case there is a conflict between the evidence of the collectors and the Form 8 declarant going on the one hand to the quality of supervision and care taken by the union officer responsible for the application and, in the alternative, to the credibility of the collectors upon whose signed documents the Board is asked to rely. In these circumstances we have little alternative but to conclude, as we do, that upon the evidence before us, we cannot be satisfied, on the balance of probabilities, that the applicant has the required membership strength of not less than 35% of the 190 employees in the proposed bargaining unit. While that is the result of our refusal to give any weight to the cards associated with Eva Roberts, Arnaldo Tarantino and Jack Monteleone, it may be useful to add that were it necessary to the result the Board would not, in the alternative, be prepared to give weight to any of the documentary evidence filed, as it cannot, with any reasonable certainty, rely on the Form 8 declaration or accept without serious reservation the oral testimony of Mr. Dorfman.

13. Lastly, we feel it necessary, because of its disturbing implications, to respond to the argument of counsel for the applicant that Mr. Dorfman's conduct should be judged by the lower standard of the rank and file union member because this was the first organizing campaign that he has supervised. We emphatically disagree. Full effect must be given to the considerations that underlie the requirement of the Form 8 declaration. In the certification process accountability is essential and anyone who bears the mantle of union office must, for the purposes of the Board, bear the responsibilities that the Board's policies attribute to that office.

14. The application is dismissed.

15. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the voting constituency within the period of six months from the date hereof.

16. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

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**1764-75-JD** The Western Ontario District Council of The United Brotherhood of Carpenters and Joiners of America and The United Brotherhood of Carpenters and Joiners of America, Local 1946, (Complainants), v. **Urban Consolidated Construction Corporation Ltd.**, Talbot Square Ltd., Reliance Development Project Management Corporation Ltd., 290632 Ontario Limited and Labourers' International Union of North America, Local 183 (Respondents).

**Jurisdictional Dispute – Effect of application of Board's dispute resolution criteria to situation where concrete forming methods normally used on high rise residential projects are being used on commercial project.**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

**APPEARANCES:** *L. A. MacLean and T. G. Harkness appearing for the complainants; J. C. Murray and D. K. Gray appearing for Urban Consolidated Construction Corporation Ltd. ("Urban"), Talbot Square Ltd. ("Talbot") and Reliance Development Project Management Corporation Ltd. ("Reliance"); J. B. Noonan for 290632 Ontario Limited ("290632"); and A. M. Minsky and Louis Castaldo appearing for Labourers' International Union of North America, Local 183 ("Local 183").*

**DECISION OF R. A. FURNESS, VICE-CHAIRMAN, AND BOARD MEMBER H. J. F. ADE:** February 10, 1977

1. The complainants have requested the Board to issue a direction under section 81 of The Labour Relations Act with respect to the assignment of certain work which is more particularly set forth in paragraph two. This work has been assigned to members of Local 183 by 290632. Having regard to the representations before it, the Board is satisfied that it has jurisdiction to entertain the complaint.

2. The parties have agreed that the work in dispute (the "work") may be defined as follows:

The construction, erection and dismantling of concrete form work as follows:

a. *Construction and Erection* (including the aligning and final positioning) of (a) footing forms, (b) the building and aligning of flying forms and including the final positioning and adjustment of screw jacks, (c) wall forms, (d) column, pier, beams, girders and slab forms including the adjustment of all screw jacks, (e) ancillary, continuous and special forms, for example, sidewalks, curbs and stairs.

2. *Dismantling or Releasing Operation* (a) Reusable vertical forms (including flying vertical forms). The releasing of the wedges and clamps and removal of the plywood sheeting from the concrete surface, (b) Reusable flat forms (including flying forms for slab forming). The releasing of the screw jacks to allow the movement of the flying forms to new locations.

3. The parties have further agreed that the complainants do not, with respect to the job which is affected by this complaint, claim the installation of reinforcing steel and/or the pouring of concrete. In addition, the parties have also agreed that there is no dispute that the following work is properly performed by construction labourers:

1. Screwing, cleaning, oiling and carrying to the next point of erection and the stripping of forms which are not to be re-used and of forms on all flat arch work.

2. The stripping of the braces, strong backs, walers and studs.

3. With respect to flying forms, the movement of the form to the crane and the hooking on of the crane and the movement of the flying form to the new location.

4. This complaint arises in connection with a project in London which is known as Talbot Square. Urban is the general contractor on the project and has subcontracted the work to 290632. Urban has not itself assigned any of the disputed work and does not have a collective agreement with the complainants. Reliance is the project manager at the site, has not made any assignment of the work and does not have a collective agreement with the complainants.

5. 290632 has assigned the work to members of Local 183. 290632 adopted the position that it is currently bound by a collective agreement with Local 183 and that in accordance with the provisions of this collective agreement it has assigned and continues to assign the work to members of local 183. 290632 also maintained that the assignment of work is proper under the criteria set out in The Labour Relations Act and in the Board's policies.

6. Local 183 adopted the position that the work should be performed by its members because construction labourers had always been associated with this work and are more qualified to do the work than are members of the complainants. Local 183 also relied on the practice of the industry, economy and efficiency, its own jurisdiction, its collective agreement with 290632 and the past practice of 290632 in support of its claim for the work.

7. The work arises in connection with the construction of a project which is known as Talbot Square and is intended to be part of a scheme for urban renewal. Talbot Square consists of an underground parking system, a podium which will contain stores. Three towers are to be erected on the podium. The three towers will respectively contain a hotel, apartments and offices.

8. Talbot Square is being built by 290632 using a method of construction which is known as the residential approach. We shall return to and describe the residential approach subsequently and compare and contrast it with the commercial approach to construction.

9. During the mid-nineteen-sixties an innovation known as flying-forms was pioneered in Metropolitan Toronto. Flying forms are constructed on the ground and are lifted into position and from position to position by means of a crane. They are generally used above ground level and usually above the third or fourth floor where typical (similar) walls, floors and other integral members of a building are repetitiously constructed. A form may

be considered as a fabrication which is used to obtain certain required shapes upon the setting of poured concrete. Initially flying forms were used in high-rise apartment building which were constructed from poured concrete. About eight years ago the economies of structures of poured concrete were applied to commercial buildings. During the mid-nineteen-sixties the standard for office buildings in southern Ontario was structural steel and less than twenty per cent used concrete. Even in these instances rib slabs were used.

10. During 1970 various attempts were made to organize the employees of the forming companies which operated in the residential high-rise forming field. For the most part these attempts were made by the Canadian Union of Construction Workers and the Council of Concrete-Forming Trade Unions. It is fair to say that while a number of certifications were obtained from the Board these organizational drives were essentially unsuccessful. However, in 1971 Local 183 succeeded in obtaining collective bargaining rights with respect to many of these employees by signing a collective agreement with The Toronto Form Work Association.

11. These forming companies in the residential high-rise field evolved a method of deploying their labour forces in a manner which blurred the traditional lines of demarcation between the crafts. While the companies engaged in commercial construction recognized the traditional lines between the crafts and conducted their operations on the basis of each craft performing an assigned proportion of the required work, during the nineteen sixties the forming companies in the residential high-rise field deployed their labour forces in a manner which required their employees to perform a variety of tasks. The performance of these tasks required these employees to cross back and forth between the traditional lines of demarcation between the crafts. Frequently, these employees would cross these lines of demarcation several times in one day. During the nineteen-sixties these employees were commonly classified by the forming companies in the residential high-rise field as form workers. On the other hand, the companies engaged in commercial construction, in recognizing the traditional lines of demarcation between the crafts, utilized the four basic crafts, namely, carpenters, construction labourers, reinforcing rodmen and cement masons.

12. Talbot Square is essentially a commercial building which is being constructed of concrete. 290632 is employing members of Local 183 to build Talbot Square. In using the residential approach to construct what is essentially a commercial building, 290632 is deploying its work force as it always does. The evolution of methods in erecting buildings of concrete has led to not inconsiderable economies in time and cost of construction. Changes in methods and the consequent change in the deployment of the work force to construct an essentially commercial building have been confronted by the complainants which represent one of the four basic crafts found in commercial construction. It is at this point that the jurisdictional dispute which forms the subject matter of this complaint has occurred.

13. In the *Anchor Shoring Limited* case [1974] OLRB Rep. 528, the Board referred to various criteria which are considered in making a direction under section 81(1) of The Labour Relations Act. These criteria are (a) collective bargaining relationships, (b) skill and training, (c) considerations of economy and efficiency, (d) the employer's practice and (e) the area practice.

14. The complainants are parties to a current collective agreement with The General Contractor and Carpentry Contractor Section of The London and District Construction



Association which is in effect in the Board's geographic area #3. London is within this geographic area. A number of employers are bound by this collective agreement and the carpenters who are covered by this collective agreement are employed from time to time to do formwork. However, 290632 is not covered by this collective agreement. In fact 290632 is a party to two other collective agreements. One collective agreement is with Local 793 of the International Union of Operating Engineers and covers the operators of cranes. The other is a current collective agreement, which is binding on 290632, and is between Local 183 and The Toronto Form Work Association and covers all construction employees while working in and out of the Board's geographic area nos. 4, 5, 6, 7, 8, 9, 10, 11, 18, 26, 27 and 28, save and except non-working foremen and persons above the rank of non-working foreman and persons covered by the collective agreement with Local 793 of the International Union of operating Engineers.

15. The collective agreement between Local 183 and The Toronto Form Work Association specifically covers the employees who are performing the work, namely, form builder-setters, form helpers and reinforced concrete workers (including persons engaged in placing reinforcing steel bar, concrete finishing and form builder-setter improvers). On the evidence before us, we find that virtually all of the employees of 290632 are working out of the Board's geographic area #8 and are by the terms of this collective agreement covered on the Talbot Square project. 290632 applies the terms of this collective agreement to these employees. From time to time 290632 employs members of Local 1059 of the Labourers International Union of North America to work on the Talbot Square project. Local 1059 is based in London and this collective agreement is applied to its members in these circumstances.

16. The criterion of collective bargaining relationships as between the parties to this complaint clearly favours the claim to the work of Local 183. By virtue of the collective agreement with The Toronto Form Work Association, Local 183 may claim to have its members perform the work.

17. The evidence before the Board establishes that members of the complainants and members of Local 183 possess the necessary skills to satisfactorily perform the work. The only difference is the manner in which the skills are obtained. Carpenters are now required to serve a period of apprenticeship before qualifying as carpenters in Ontario. The skills required for this work are but a portion of the skills which a qualified carpenter acquires during his period of training. The members of Local 183, however, for the most part receive their training and acquire their skills by working with an employer such as 290632 for a period of two to six months.

18. Employees of 290632 possess a variety of skills and each employee has sufficient skill not only to perform his own principal task but also sufficient skill and experience to assist other employees of 290632 in other aspects of formwork. The employees who construct and erect the forms possess the same skills as a carpenter who might on another project construct and erect similar forms. However, the evidence does not establish that these employees are qualified carpenters in Ontario. The members of Local 183 acquire their skills and training on the job and realize that there is a natural progression from form helper to form builder-setter improver to form builder-setter. Members of Local 183 who commence employment as unskilled or semi-skilled workers progress as far and as rapidly as their skills and inclination will take them. The commitment to formwork by members of Local 183 is

substantial. Between 1,600 and 2,300 members of Local 183 out of a total membership of 6,200 (25% to 37%) work in and out of the Board's geographic area #8 as formworkers.

19. The second criterion of skill and training is clearly possessed by members of the complainants and Local 183. Accordingly, this criterion equally favours the claim of the complainants and the claim of Local 183.

20. The third criterion is considerations of economy and efficiency. In this regard 290632 sought to introduce the evidence of a study by Mr. Derek Cooper with respect to the economies and efficiencies of using members of Local 183 on poured concrete structures versus the use of four local trade unions (representing carpenters, construction labourers, reinforcing rodmen and cement masons) in the Board's geographic area #8. It was argued that since it was not possible to make a direct comparison with respect to projects in the Board's geographic area #3, the Board should not receive this study in evidence as being relevant and as forming a basis for comparison. The respondents argued that this evidence should be admitted and that its relevance could be argued when the parties made their representations before the Board. The complainants argued that the study should not be admitted in evidence because it was an attempt to introduce evidence of area practice with respect to an area other than the geographic area where the work was being performed.

21. The Board ruled that Mr. Cooper's study was admissible and stated that his evidence would be received by the Board not on the question of area practice but rather on the question of economy and efficiency. The Board also ruled that the weight to be given to his evidence depended upon the degree to which the premises behind his evidence were shown to be clearly applicable to the project which was affected by this complaint.

22. It was also necessary for the Board to rule upon a request by the complainants to adduce evidence in reply respecting area practice and economy and efficiency. The respondents objected to the adducing of such evidence in reply.

23. The Board ruled that the complainants had adduced evidence respecting the salvaging of wood which is used in the process of concrete forming and that the respondents were permitted to adduce evidence in the question of economy and efficiency in the Board's geographic area #8 and in southern Ontario generally and to have such evidence applied to the Talbot Square project to the extent that such evidence was shown to be applicable to the Talbot Square project. In our view, the complainants could not reasonably have anticipated the introduction of such evidence by the respondents. The question to be determined was whether the evidence which the complainants sought to introduce should be adduced as proper evidence in reply. The Board of course, has a discretion with respect to permitting evidence in reply. The adducing of such evidence was not a matter of natural justice, as argued by the complainants, but rather related to the Board's discretion regarding evidence in reply and the Board's procedure. As the courts have remarked on many occasions, the Board is the master of its own procedure. Because the Board was being asked to make certain inferences regarding the question of economy and efficiency with respect to the Talbot Square project, the Board ruled that it desired to have every possible assistance from all parties. On balance the Board was of the opinion that the complainants should be permitted to adduce evidence in reply, not on the question of area practice outside the Board's geographic area #3 but rather on the question of economy and efficiency in rebuttal to the evidence on this point which the respondents had adduced.



24. We find that the evidence respecting economy and efficiency does not favour either the complainants or Local 183. The evidence from the witnesses who were called by the complainants was not very illuminating. Mr. McMundo testified that the use of carpenters to perform the work was the most economical utilization of manpower which was available to his company. His company is bound by a collective agreement which requires the use of carpenters for this work. Mr. Grant was quite sure that it was impossible for him to make comparisons between the use of members of the complainants and members of Local 183. The only economy and efficiency that Mr. Tiefenback mentioned was the saving of lumber in using members of the complainants. There is much evidence which disagrees with this observation. Mr. Harkness testified that it was more economical to have carpenters screw and unscrew jacks because they had erected them.

25. Mr. Cooper's study was an interesting insight into the cost factors of poured concrete structures. However, his study related to the Board's geographic area #8 and there was no additional evidence which made his study clearly applicable to the Talbot Square project. Mr. Cooper had not seen the actual site of Talbot Square and has had no experience in labour relations. It is impossible to apply the conclusions in his study to Talbot Square. While Mr. Cooper testified, for example, that the commercial trade unions in Toronto are more productive than the commercial trade unions in other parts of Southern Ontario, there was no additional evidence respecting the interpretation and administration of collective agreements in the Board's geographic area #3 in the context of scheduling work and the deployment of the labour force in the commercial approach to poured concrete structures.

26. There was a great deal of evidence from the corporate respondents to the effect that there is a thirty per cent higher cost in using members of commercial trade unions rather than members of Local 183. No doubt the corporate respondents are convinced of the accuracy of this figure and no doubt this figure played a part in 290632 securing the contract for the formwork. However, the evidence established that in computing this figure of thirty per cent such factors as differentials in hourly rates of wages, longer hours of work and lower overtime rates were clearly important factors. While none of the respondents unequivocally asserted such factors as proper considerations for the Board, the evidence from the corporate respondents clearly took such factors into consideration in their views of economy and efficiency. As the Board stated in the *Anchor Shoring Limited* case, *supra*, and in the *Deep Foundations Limited* case, [1975] OLRB REP. 175, wage rates are not determinative of this criterion. It is neither the function nor the intention of this Board to take wages and hours of work into account in considerations of economy and efficiency.

27. In our view the criterion of economy and efficiency is best approached on the basis of the most economical and efficient manner of deploying a labour force and the productivity of that labour force. For example in the *Adam Clark Company Limited* case (unreported decision of the Board in File # 0911-75-JD, decision dated May 21, 1976), the Board stated in paragraph 29:

"29. The Board finds that very little skill or training is required to operate a fork-lift. With respect to economic considerations, the evidence clearly establishes that it is more economic to use members of Local 46 to operate fork-lifts rather than members of Local 793. The use of fork-lifts is intermittent and is dependent upon the progress of work by



members of Local 46. The use of members of Local 793 would be uneconomical and would mean a duplication of work by members of Local 46. The Board finds on the evidence that a fork-lift truck is a tool of the trade of members of Local 46 and that the intermittent use of fork-lift trucks is most economically accomplished by using members of Local 46.”

In this regard also see the *Clement and Bellmore Construction Limited* case [1967] OLRB REP. 464, 467-8.

28. There was evidence regarding inefficiencies in scheduling work in the Board’s geographic area #8 when comparing the residential approach against the commercial approach. There was also some evidence concerning the refusal of members of trade unions who are employed within the commercial approach to poured concrete structures to cross jurisdictional lines. However, there was no clear evidence on this point with respect to the Board’s geographic area #3.

29. On the evidence concerning the criterion of economy and efficiency, we are not prepared to find that this criterion either supports the claims of the complainants or Local 183. In general this criterion may be asserted by showing the deployment of the labour force, the economies and efficiencies of certain methods of construction and the scheduling of work. It is never possible to demonstrate with absolute precision that economy and efficiency are to be found in one circumstance rather than another. It is possible to show on the balance of probabilities either directly or by reasonable inference that economy and efficiency exist with respect to the project which forms the basis of a jurisdictional dispute when work is performed by certain employees rather than by other employees.

30. The evidence respecting the criterion of the employer’s past practice and therefore the employer’s preference establishes that 290632 is but one of a series of companies which perform the work with the residential approach. 290632 has been in existence since the latter part of 1973. Prior to the Talbot Square project 290632 has not worked either in London or the Board’s geographic area #3. It was argued by the complainants that since 290632 had not undertaken any work in the Board’s geographic area #3 prior to the Talbot Square job it did not have a practice with respect to the Board’s geographic area #3. In the alternative the complainants argued that 290632 had not been in existence long enough and had not undertaken sufficient work to have a practice. The Board disagrees with both of these contentions. It is not necessary to have a practice with respect to the geographic area in which the work in dispute is being performed. While 290632 has been in existence for a comparatively short period of time it has been actively engaged in construction and has built a complex of four apartment towers in Oakville. This complex includes a commercial area and was constructed over a period of many months. The magnitude and duration of this construction work in Oakville is sufficient to establish that this criterion favours the claim to work of Local 183.

31. The criterion of area practice in our view favours the claim of the complainants to the work as opposed to the claim of Local 183. Talbot Square is predominantly and essentially a commercial project. Mr. Grant testified that during the last three years in the Board’s geographic area #3 seventy to seventy-five per cent of construction in the industrial, commercial and institutional sector had been performed by using the commercial ap-

proach with its multi-trade concept. The remaining twenty-five to thirty per cent has been performed by a labour force which has not been unionized. In the same area up until the last three years less than ten per cent of reinforced concrete construction forming has been performed by that portion of the labour force which has not been unionized.

32. While there was some disagreement between Mr. McMurdo and Mr. Tiefenback on the question of whether members of the complainants or construction labourers erected scaffolding and while there was also disagreement between Mr. Tiefenback and Mr. Harkness on the question of whether members of the complainants or construction labourers stripped non-reusable forms; when the evidence is viewed as a whole we find that the evidence before us marginally establishes that the work in the Board's geographic area #3 has been predominantly performed by members of the complainants.

33. The criteria of collective bargaining relationships and employer's practice favour the claim to the work by Local 183. The criterion of area practice marginally favours the claim to the work by the complainants. While we do not minimize the criterion of area practice, we find that in the circumstances of this complaint Local 183 has established a better claim to the work based upon its collective bargaining relationship with 290632 and the latter's practice and preference of having members of Local 183 perform the work.

34. We accordingly make the following direction:

290632 Ontario Limited shall continue to assign to members of the Labourers' International Union of North America, Local 183 in connection with the construction of the project known as Talbot Square in the City of London and known for municipal purposes as 100 Dundas Street, London, the following work:

The construction, erection and dismantling of concrete form work as follows:

(1) *Construction and Erection* (including the aligning and final positioning) of (a) footing forms, (b) the building and aligning of flying forms including the final positioning and adjustment of screw jacks, (c) wall forms, (d) column, pier, beams, girders and slab forms including the adjustment of all screw jacks, (e) ancillary, continuous and special forms, for example, sidewalks, curbs and stairs.

(2) *Dismantling or Releasing Operation* (a) Reusable vertical forms (including flying vertical forms). The releasing of the wedges and clamps and removal of the plywood sheeting from the concrete surface, (b) Reusable flat forms (including flying forms for slab forming). The releasing of the screw jacks to allow the movement of the flying forms to new locations.

#### **DECISION OF BOARD MEMBER E. BOYER:**

I dissent for reasons to be given .

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**1449-76-U International Chemical Workers, Local 159, (Complainant), v. Kodak Canada Ltd., (Respondent).**

**S79 – Change In Working Conditions – Certification – Trusteeship – Arbitration – Whether freeze imposed under section 70(1) preserves voluntary revocable check off following expiry of collective agreement – Whether freeze imposed under section 70(2) following application for certification preserves employer obligation to remit dues to displaced union – Whether following trusteeship employer required to remit dues to trustee – Whether Board should defer to arbitration when dispute involves interpretation of the Act which may have implications beyond the particular relationship of the parties.**

**BEFORE:** Donald D. Carter, Chairman, and Board Members O. E. Hodges and N. B. Satterfield.

**APPEARANCES:** *J. Cameron Nelson, Gord Livingstone and Stewart Netherton for the complainant; A.D.G. Purdy and J.W. Brentham for the respondent.*

**DECISION OF THE BOARD:** February 8, 1977

1. This is a complaint under section 79 of the *Labour Relations Act* in which the complainant alleges that the respondent has violated section 70 of the Act by discontinuing the deduction of union dues during the “freeze period” imposed by subsection 1 of that section.

2. The facts of this case were not disputed by the parties. The complainant (Local 159) and the respondent (Kodak) had entered into a collective agreement that, according to its terms, expired at midnight, November 6, 1976. The collective agreement contained provisions establishing a voluntary, revocable dues check-off, worded in the following terms:

**ARTICLE 6 – CHECK-OFF**

6.01 The Company will during their term of this Agreement if and to the extent authorized by each employee in the manner hereinafter set out, but not otherwise, deduct

- (1) from the first weekly pay of wages earned payable to such employee after the date when such authorization becomes effective, the sum of Two (2) Dollars as the initiation fee for membership in the Union and/or
- (2) from each weekly pay of wages earned payable to such employee after the date when such authorization becomes effective, the sum of Two Dollars and Twenty-five Cents (\$2.25) or such greater or lesser sum as may be imposed from time to time (by vote of the membership of the Union held pursuant to its by-laws) as the amount of weekly dues to be paid by each member of the Union to maintain his membership in the Union. Provided that the Company shall rely upon the most recent certificate of the Recording Secretary of the Union in determining the sums to be deducted from time to time hereunder but no such certificate shall become



effective until the seventh day after it has been delivered to the Cashier of the Company,

and remit the sums so deducted within 1 week to the Financial Secretary of the Union. Any such authority to the Company, if given prior to the term of this Agreement, shall be in writing in the form set out in Schedule "A" to any collective bargaining agreement executed on or after the 28th day of October 1958 and in force between the Company or its predecessors, Canadian Kodak Co., Limited and Canadian Kodak Sales Limited, and the Union at the time when such authority was given. Any such authority to the Company if given during the term of this Agreement shall be given in writing in the form set out in Schedule "A" hereto, shall be irrevocable except as herein provided and shall be prepared in duplicate. The original shall be delivered to the Cashier of the Company and the duplicate retained by the Union. It shall take effect on the seventh day following the date of its receipt by such Cashier, or at such earlier time as the Company and the Union may agree upon, and on taking effect shall automatically revoke all previous authorities given by the employee concerned to the Company or its predecessors, to make any deduction from his pay and remit the amount so deducted to the Financial Secretary of the International Chemical Workers' Union, Local 159.

6.02 The Company will be at the time of making each such payment to the Financial Secretary of the Union, name the employees from whose pay such payment has been deducted.

6.03 Any such authority given by an employee to either of Canadian Kodak Co., Limited or Canadian Kodak Sales Limited prior to, or to the Company during the term of this Agreement shall be automatically cancelled if such employee's service with the Company is terminated for any reason except the case of a lay off for slack work for a period of less than one year.

6.04 Any such authority, whether given prior to or during the term of this Agreement, may be revoked only during the first thirty (30) days of the term of any Collective Bargaining Agreement made between the Company and the International Chemical Workers Union, Local 159, covering the bargaining unit referred to in this Agreement or during the first thirty (30) days following the signing of any such agreement whichever period shall be later. Any such revocation shall be in writing in the form set out in Schedule "B" hereto, shall be signed in duplicate by the employee concerned and both copies shall be delivered to the Cashier of the Company. Any such revocation so signed and delivered within the period above mentioned shall become effective on the seventh day following the date of its receipt by such Cashier. The duplicate of every such revocation shall be forwarded by the Company without undue delay to the Financial Secretary of the Union.

The schedules referred to in these provisions are set out below:

### SCHEDULE "A"

Date .....

To KODAK CANADA LTD.

During the term of any Collective Bargaining Agreement made between you and the International Chemical Workers' Union, Local 159, which provides for the deduction from the pay of employees in a bargaining unit or units of which I am a member, until my service with you shall be broken or that Union advises you that my membership in the Union is withdrawn you are hereby authorized and requested to deduct

- (1) from the first weekly pay of wages earned, payable to me after the date when this authorization become effective, the sum of Two (2) Dollars as my initiation fee for membership in the Union

and/or

- (2) from each weekly pay of wages earned, payable to me after the date when this authorization becomes effective, the sum of Two Dollars and Twenty-five Cents (\$2.25) or such greater or lesser sum as may be imposed from time to time (by vote of the membership of the Union held pursuant to its by-laws) as the amount of weekly dues to be paid by each member of the Union to maintain his membership in the Union. Provided that you shall rely upon the most recent certificate of the Recording Secretary of the Union in determining the sums to be deducted from time to time hereunder, but no such certificate shall become effective until the seventh day after it has been delivered to the Cashier of Kodak Canada Ltd.,

and remit the amount so deducted to the Financial Secretary of the said Union within one (1) week. This authorization shall become effective on the seventh day following the date of its receipt by the Cashier of Kodak Canada Ltd. or at such earlier time as you and the Union may agree upon. This authorization shall be irrevocable except during the first thirty (30) days of the term of any Collective Bargaining Agreement made between you and the International Chemical Workers' Union, Local 159, covering a bargaining unit of which I am a member or during the first thirty (30) days following the signing of any such agreement, whichever period shall be later. On this authorization becoming effective, it shall automatically revoke all previous au-

thorizations given by me to Kodak Canada Ltd., Canadian Kodak Co., Limited or Canadian Kodak Sales Limited to make any deduction from my pay and remit the amount so deducted to the Financial Secretary of the International Chemical Workers' Union, Local 159.

.....  
Signature

.....  
Clock Card Number

.....  
Address

NOTE – Strike out (1) if not applicable.

#### SCHEDULE "B"

Date .....

To KODAK CANADA LTD.

I hereby revoke every authorization and request heretofore given by me to you or to your predecessors Canadian Kodak Co., Limited or Canadian Kodak Sales Limited to make any deduction from my pay and remit the amount so deducted to the Financial Secretary of the International Chemical Workers' Union, Local 159. This revocation shall become effective on the seventh day following the date of its receipt by the Cashier of Kodak Canada Ltd.

.....  
Signature

.....  
Clock Card Number

NOTE – This revocation is ineffective and will not be accepted by the Cashier of Kodak Canada Ltd. except during the first thirty (30) days of the currency of a collective agreement between the Company and the Union or during the first (30) days after the signing of such an agreement, whichever is later.

3. Bargaining for a renewal of this collective agreement commenced well prior to its contractual expiration, notice to bargain being served on August 13, 1976. A number of bargaining sessions, held during the period running from August 13th to October 7th, failed to bring the parties to an agreement. On October 7th, a request was made for the appointment of a conciliation officer and, on October 18th, the parties were advised by the Minister of Labour that an appointment had been made. Conciliation meetings occurred on six occasions between October 22nd and November 5th, but the stalemate remained unresolved. At the time of the hearing of this matter, however, the Minister had not yet notified the parties



that she did not consider it advisable to appoint a conciliation board, a notification often referred to as the "no-board report".

4. A new factor was introduced into the situation on November 5th when the United Steelworkers filed a certification application for the unit of employees then represented by the complainant. Following this application, on November 12th, Local 159 was placed under supervision and receivership, by the international union, supervisory control being placed in the hands of International Vice-President Stewart Netherton and International Representative William Mutimer. Kodak was informed of the imposition of the trusteeship in a telegram from Mr. Frank Martino, president of the International Chemical Workers' Union, dated November 12th, and in his letter of confirmation, written on November 15th. The letter stated:

Re: Imposition of International Supervision and Receivership over International Chemical Workers Union, Local 159.

Gentlemen:

In a wire dated November 12, 1976, I advised you that International supervision and receivership had been imposed over the above-stated local union, upon the request and recommendation of International Vice President Stewart Netherton, and for good cause shown, effective November 12, 1976.

I further advised you that International Vice President Stewart Netherton had been appointed supervisor and receiver and that International Representative William Mutimer had been appointed deputy supervisor and receiver, and as such they will act as my deputies and agents in all matters relating to this local union.

I have instructed International Vice President Stewart Netherton and International Representative William Mutimer to take charge of all assets of the local union, including funds in bank or banks and to negotiate and/or police the terms of the bargaining agreement between your Company and Local 159, and to do all other things necessary in order for the local union to function properly.

I have further authorized the supervisor and deputy supervisor of this local union to remove and appoint replacements for officers and other representatives of the local union who fail or refuse to cooperate with them in the performance of their duties or as they otherwise deem necessary.

You may consider this your official notification that International Vice President Stewart Netherton and International Representative William Mutimer are in fact the supervisor and receiver and deputy supervisor and receiver, respectively, over Local 159, and that they are the proper persons to receive checkoff payments, to negotiate and police the contract in person or through their designated agents, and to do all other things necessary to carry out the language, spirit and intent of the bargaining agreement between your Company and our Local 159.

The authority for my action may be found in Article VI, Section 5 of the International Union Constitution, a copy of which is enclosed.

I shall immediately notify you when any or all restrictions are removed from this local union.

I will appreciate your cooperation and assistance to International Vice President Stewart Netherton and International Representative William Mutimer in carrying out their functions.

Sincerely yours,  
[sgd] "Frank D. Martino"  
Frank D. Martino, President

5. On November 15th, however, Kodak posted a notice advising employees that there would be no further check-off of union dues. The notice read:

To Bargaining Unit employees, Local 159, I.C.W.U.

In accordance with the terms of Article 6.01 and Schedule "A" of the Collective Bargaining Agreement which terminated midnight November 6, 1976, there will be no further payroll deduction of union dues. This will be reflected in pay cheques distributed on or about November 18, 1976.

[sgd] "John Hill"  
Director of Corporate  
Relations

The dues check-off was in fact terminated as of the pay period commencing on November 7th. The termination of the dues check-off upon the contractual expiry of the collective agreement was a deviation from the practice followed in similar bargaining situations occurring during the ten-year relationship between Kodak and Local 159. Apparently, on previous occasions, the check-off had continued until being renewed by a new agreement, or until the parties had reached the strike-lock-out position.

6. At about the same time as these events were occurring the Board was dealing with the application for certification from the Steelworkers. A pre-hearing vote was ordered on November 25th, and the vote itself was taken on December 7th and 8th. The report of the returning officer, received just prior to the hearing in this matter, indicated that the Steelworkers had received more votes than the incumbent, Local 159. Barring any defects in the vote, then, Local 159 faced the imminent prospect of having its bargaining rights divested by operation of section 48 of the Act.

7. Of primary importance in this case is the issue of the extent of the freeze imposed by section 70(1) of the *Labour Relations Act*. The respondent submitted that the freeze did not have the effect of extending all of the legal consequences that flow from a collective agreement, but only of prohibiting the alteration of the terms and conditions of employment established under the collective agreement. This distinction, according to the respondent, was significant for two reasons. First, the check-off provision in the collective agreement could not be considered as a term or condition of employment and, therefore, could

not continue after the contractual expiry of the collective agreement. Second, even if the check-off provision continued in force, the individual assignments, being limited to the term of any collective agreement, exhausted themselves once the contractual term had expired.

8. There is an initial question, however, as to whether it is appropriate for this matter to be resolved by the Labour Relations Board. Although both parties agreed that it was desirable for the Board to dispose of the issue, given the delays now associated with the arbitration process and the probability that their collective bargaining relationship would soon be brought to an end, counsel representing the parties candidly admitted that the Board's decision in *United Gas Ltd.* (1965), 65 CLLC ¶16,056, might now allow them to opt for resolution of this matter by the Board. In *United Gas Ltd.*, the Board declined to exercise its jurisdiction to deal with a complaint alleging a violation of section 59(1) [now section 70(1)], and instead, deferred to grievance arbitration. The Board stated in that decision:

Section 59(2) of the Act makes it abundantly clear, however, that either of the parties to these proceedings is entitled to refer the matter which the complainant is asking this Board to decide, to a Board of Arbitration as if the collective agreement under and by virtue of which the union dues were deducted was still in operation. It is the well-established practice of this Board, that where the conduct complained of as constituting a basis for relief under section 65 of the Act is properly the subject matter of a grievance under a subsisting collective agreement, that as a general rule, this Board should decline to inquire into the grievance under section 65 of the Act. The Board's practice recognizes that it is more in character with the functions of the collective bargaining process as envisaged by the legislation if the parties to a grievance arising under a collective agreement are left to utilize the procedures and remedies contemplated by their agreement. In this respect the parties ought not to be allowed to circumvent these procedures and remedies by the simple expedient of submitting the grievance to the Labour Relations Board in the guise of a complaint under section 65. (See, *The National Showcase Company Case*, (1960) CCH Canadian Labour Law Reporter, ¶16,185 [61 CLLC ¶16,185], C.L.S. 76-715; *Dominion Stores Ltd. Case*, Board File No. 2858-61-U; *Wallace Barnes Company Case*, (1961) CCH Canadian Labour Law Reporter, ¶16,198 [61 CLLC ¶16,193], C.L.S. 76-742; *Canadian John-Manville Company Limited Case*, Board File No. 410 -62-U, Monthly Report, Ontario Labour Relations Board, August 1962, p. 173; *Heist Industrial Services Case*, Board File No. 5048-62-U.) While the collective agreement between the parties in the instant case is no longer in operation, the effect of section 59(1) of the Act is to preserve the terms or conditions of employment provided therein. Each party is prohibited without the consent of the other from altering or changing those terms or conditions until the occurrence of the events prescribed in paragraphs (a) and (b) of section 59(1).

The legislature has made the questions in dispute in this case the subject matter of inquiry and determination by a Board of Arbitration in the same way as a grievance under the collective agreement. In our view, and apart from any other consideration, it is more in keeping with the functions of the collective bargaining process if the parties to this complaint are required to submit their differences to a Board of Arbitration as provided in section



59(2) in the same way as they would had the matter arisen as a grievance under an existing collective agreement.

9. The statements contained in *United Gas Ltd.* do not, in our opinion, establish any absolute bar preventing the Board from resolving a complaint arising out of the operation of section 70(1). At most these statements raise a general presumption that grievance arbitration is to be the preferred forum where that procedure has been preserved by the statutory freeze. This general presumption recognizes that disputes arising out of collective agreements, and not having implications that extend beyond those collective agreements, should be dealt with by reference to the dispute resolution procedure of grievance arbitration. However, once a dispute can be characterized as being something more than just a dispute relating to the interpretation, administration, or alleged violation of a collective agreement, this general presumption must necessarily give way. Although grievance arbitration is the proper forum for the resolution of matters relating to individual collective agreements, it is the Labour Relations Board that has been entrusted with the responsibility for resolving matters that go to the general structure of collective bargaining in this Province. Where such matters arise, therefore, it is this Board that provides the proper forum for their resolution, and deferral to grievance arbitration can no longer be the appropriate response.

10. The matters raised by the parties in the instant case have implications that extend beyond their own collective bargaining relationship. The primary issue concerns the extent to which section 70(1) preserves legal relationships once the contractual term of a collective agreement has expired. Two other matters of some general importance were also raised in this case – the question of the effect of a trusteeship upon existing obligations under a collective agreement, and the question of the extent of the freeze under section 70(2), activated by the application for certification by the Steelworkers. The nature of these issues makes it clear to us that this dispute is one where the general presumption favouring a deferral to grievance arbitration would amount to an abdication of our responsibility for the administration of the *Labour Relations Act*.

11. There does not appear to be any clear statement of the Board concerning the effect of section 70(1) upon the relationship of parties bargaining toward a renewal of their collective agreement. Statements made in *United Gas Ltd.*, *supra*, suggest that, once the contractual term of the collective agreement expires, the collective agreement ceases to operate leaving only the terms and conditions of employment contained in the expired collective agreement. These remarks, however, appear to give an unduly restrictive interpretation to the language of section 70(1). This subsection prohibits an employer from altering unilaterally not only “rates of wages or any other term or condition of employment” but also “any right, privilege or duty, of the employer, the trade union, or the employees”. By the same token, the union is prohibited from altering unilaterally “any term or condition of employment or any right, privilege or duty of the employer, the trade union, or the employees”. What appears to be contemplated by the Legislature is a total freeze of all of the legal incidents of the collective bargaining relationship. Given the prohibition of strikes and lock-outs between the expiry of a collective agreement and the occurrence of the “no-board” report, it seems reasonable to conclude that the Legislature intended to prohibit the parties during this same period from altering the collective bargaining relationship, and by so doing, imposing economic sanctions falling short of the strike or lock-out. This legislative prohibition, therefore, is intended to stabilize the collective bargaining relationship, allowing both parties a period in which they can negotiate the terms of their future relationship free

from the disturbing influence that would result from alterations in their existing relationship.

12. A total freeze of the collective bargaining relationship also appears to be contemplated by section 70(3), providing for arbitration of differences arising during the freeze period. This provision, as interpreted by the Board in *United Gas Ltd.*, expresses a clear preference that such differences be resolved through grievance arbitration. This provision for arbitration indicates that the Legislature contemplated a continuation of the collective bargaining relationship after the contractual expiry of the collective agreement. The legislative language, therefore, does not in any way support the conclusion that only terms and conditions of employment are preserved by operation of section 70(1). Rather, the better interpretation is that all legal incidents of the collective bargaining relationship are maintained by this section until its force becomes exhausted.

13. This interpretation of section 70(1) means that it is of sufficient scope to extend the operation of Article 6, the check-off provision. Such a provision clearly amounts to a "right of a trade union", and a right that is integral to the collective bargaining relationship. The fact that the check-off provision is qualified by reference to the term of the collective agreement does not make it any less durable than any other term of the collective agreement. All terms in a collective agreement are contractually qualified by the expiry date established in the collective agreement, yet this type of qualification cannot serve to oust the effect of section 70(1). Similarly, a contractual qualification assuming a different form, as it does in Article 6, cannot frustrate the operation of the freeze period. To hold otherwise would be to allow parties to contract out of the legislative requirement that the collective bargaining relationship be stabilized until the parties are entitled to resort to economic sanctions.

14. Our conclusion is that the language of Article 6 cannot impair the effect of the freeze imposed by the statute. The check-off provision, and all other legal incidents of the collective bargaining relationship, continue in force until terminated by one of the specific events set out in section 70(1). Since the check-off provision continues in force, it follows that the individual assignments must also remain alive. These assignments, the terms of which are defined by Article 6 and Schedule "A" of the collective agreement, are as much an incident of the collective bargaining relationship as the check-off provision itself. The terms of the assignment are not the result of a bargain struck between the respondent and individual employees but, rather, the product of the collective negotiations that took place between the applicant and the respondent. This fact corresponds with the "reality" described by Laskin, C.J.C., in *McGavin Toastmaster Ltd. v. Ainscough* (1975) 75 CLLC, ¶14,277 (S.C.C.):

The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee having meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto. To quote again from the reasons of Judson J. in the *Paquet* case, at p. 214:



If the relations between employee and union were that of mandator and mandatory, the result would be that a collective agreement would be the equivalent of a bundle of individual contracts between employer and employee negotiated by the union as agent for the employees. This seems to me to be a complete misapprehension of the nature of the juridical relation involved in the collective agreement. The union contracts not as agent or mandatory but as an independent contracting party and the contract it makes with the employer binds the employer to regulate his master and servant relations according to the agreed terms.

Since the individual assignments are an incident of the collective bargaining relationship, they, just as much as the check-off provision, must be frozen by section 70(1). Any contractual qualification contained in individual authorizations, therefore, must give way to the overriding effect of the legislative freeze.

15. Our finding is that the check-off provisions and individual assignments were still in force after the contractual expiry of the collective agreement. Does the imposition of the trusteeship affect this situation in any way? The respondent pointed out that, under Article 6.01 of the individual authorizations, its obligation was to remit sums collected from the check-off to the financial secretary of the union. As the result of the imposition of the trusteeship, however, it had been instructed to remit the check-off payments to Netherton or Mutimer, neither of whom held the position of financial secretary. Although the respondent did not challenge the validity of the trusteeship, it did argue that it was not obliged to remit the dues to persons other than the financial secretary of the union.

16. The imposition of trusteeship by a parent union over its subordinate locals is expressly recognized by section 73 of the Act. This section contemplates that, in certain circumstances, the autonomy of a subordinate local may be suspended by action of the parent union. Trusteeship, although permitted by the Act, is also subject to certain controls. The suspension of a local's autonomy must be reported to the Board within sixty days after its occurrence, and it may only last for a period of twelve months except with the consent of the Board.

17. Given that trusteeship is a concept expressly recognized by the Act, and that the respondent makes no challenge to the validity of the trusteeship in this case, there appears to be no merit to the argument that the imposition of the trusteeship relieved the respondent of its obligation to remit check-off payments to the applicant. The obligation under Article 6 must be read as an obligation to remit the check-off payments to Local 159, and not to the person who actually receives the money on behalf of the local. So long as the person receiving the money is properly authorized by the Local, the respondent's obligation to remit the money remains. In this case, there is no suggestion that either Netherton or Mutimer were not properly authorized to receive the check-off payments on behalf of Local 159. The imposition of the trusteeship, therefore, does not alter the obligation of the respondent to continue to remit the check-off payments to the applicant.

18. Our conclusion is that the obligation to continue the check-off continued after the expiry of the collective agreement. This obligation could only be terminated by the occurrence of one of the events set out in section 70(1). In this case, the more probable event



would appear to be the termination of the applicant's bargaining rights by virtue of section 48. The occurrence of this event, of course, would not result in a total thaw of existing legal relationships, since the freeze imposed by operation of section 70(2) would continue. This freeze, however, is not as extensive as the freeze under subsection (1), no reference being made to any right, privilege, or duty of a trade union. The freeze under subsection (2) does not contemplate the stabilization of an existing collective bargaining relationship, since none would exist but, rather, the maintenance of the terms of the individual contracts of employment between the employees and the employer. See *Canadian General Electric Co. Ltd.*, [1965] OLRB Rep. DEc. 649. In this case, for example, once the freeze under subsection (1) is terminated by the displacement of the incumbent bargaining agent, and only the freeze under subsection (2) is left to operate, the check-off provision, being a right of a trade union, and not a term or condition of employment, could not remain frozen.

19. We find that the respondent has violated section 70(1) of the Act by discontinuing the check-off as of November 7, 1976. The respondent, therefore, is ordered to pay forthwith to the applicant all monies to which the applicant is legally entitled by the operation of section 70(1). The Board remains seized of this matter to deal with any differences arising out of the implementation of this order.

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**1555-76-R** Ontario Public Service Employees Union, (Applicant), v.  
**Charterways Transportation Limited**, carrying on business as Two Cities  
 Transit, (Respondent).

**Constitutional Law – Effect of school bus operation running a small number of school charters into the U.S.A. – Whether federal jurisdiction.**

**BEFORE:** Ian C. A. Springate, Vice-Chairman and Board Members H. J. F. Ade and M. J. Fenwick.

**APPEARANCES:** *Chris G. Paliare and Pauline Anidjar for the applicant; Michael Gordon and Geoffrey Davies for the respondent.*

**DECISION OF THE BOARD:** February 16, 1977

1. The name "Charterways" appearing in the style of cause of this application as the name of the respondent is amended to read "Charterways Transportation Limited carrying on business as Two Cities Transit".

2. This is an application for certification in which the respondent has challenged the jurisdiction of the Board to entertain the application. It is the respondent's position that, pursuant to sections 91(29) and 92(10(a)) of *The British North America Act* ("B.N.A. Act"), the industrial relations aspects of its operations come within the exclusive legislative jurisdiction of the Federal Parliament.

3. The employees affected by this application are employed by the respondent in its charter bus operation in Sault Ste. Marie, Ontario. The respondent is primarily engaged in providing school bus services for both the Public and the Roman Catholic Separate School Boards in Sault Ste. Marie. However it is also engaged in a public charter business and in the carrying of both passengers and express packages to and from the Sault Ste. Marie airport. The extent to which the respondent's operations are oriented towards servicing the two school boards is highlighted by the fact that of its 75 buses, all but one has a school bus chassis.

4. Both employees and vehicles move back and forth between the various aspects of the respondent's operations. Also, all of the respondent's operation are serviced out of one garage. At the hearing neither of the parties took the position that the respondent's operations are capable of severance such that one part should fall under Provincial jurisdiction and the other part under Federal jurisdiction.

5. Most of the work undertaken by the respondent for the school boards consists of regular school contract runs. Mr. D. Bassett, the respondent's manager, testified that this service entails a total of 66 round trips per day for 200 days a year. All of these trips are made exclusively within the boundaries of the Province of Ontario.

6. Apart from the contract runs, the respondent also operates separate charter runs for both of the school boards. Most of these runs involve student field trips. Mr. Bassett testified that some 2,000 round trips per year come within this category, and of these approximately 400 involve travel outside of the Province. With few exceptions all of these extra-Provincial school charters involve travel to and from points in the State of Michigan and, in particular, to the town of St. Ignace which is about 50 miles south of Sault Ste. Marie. From St. Ignace school groups can take a ferry over to historic Mackinac Island. During cross-examination Mr. Bassett conceded that almost all of the respondent's school charter trips to St. Ignace occurred towards the end of the school year, that is during the months of May and June.

7. There was filed with the Board a total of 477 legible (and several illegible) invoices. Mr. Bassett testified that these invoices represented a cross-section of over the past 3 years. He stated that the number of such invoices filed was not greater due to the limited time available prior to the Board hearing in which to search through the respondent's files. We have carefully reviewed the invoices that were filed. Of those invoices which relate to all of the school charters (not only those going to St. Ignace) fully 76 per cent were for trips taken during the month of June. A further 8 per cent were for trips taken during the month of May. The remaining 16 per cent represented trips distributed throughout the other 10 months.

8. The respondent's public charter operation accounts for some 400 round trips per year. Mr. Bassett testified that of these 400 trips, about 175 a year go outside the boundaries of the Province of Ontario. The invoices which were filed concerning this type of charter indicate that they occur throughout the year, although with some decrease in volume during the winter months of December, January and February. The great majority of these public charter trips are to points within the State of Michigan, and general a school bus type of vehicle is used. On rare occasions these trips involve travel to other Canadian Provinces.

9. The respondent, by virtue of being part of Charterways Transportation Limited, has the authority from the Province of Ontario and the U.S. Interstate Commerce Commission to take charter tours to any place in the continental United States. Further, we were informed by Mr. Bassett that some 20 to 25 of the respondent's 75 buses currently bear licence plates which allow them to be driven into the United States.

10. Although no specific financial data was introduced at the hearing, it was Mr. Bassett's testimony that some 10 to 15 per cent of the respondent's revenue in a "bad year" would be derived from runs which went outside the boundaries of Ontario, and that this figure could run (presumably in a "good year") to as high as 30 per cent.

11. The respondent's passenger service to the Sault Ste. Marie airport is conducted on the basis of certain contracts it has with the Federal Department of Transport and with three airlines which fly into Sault Ste. Marie. The terms of those contracts are not before the Board. The respondent's air express operation is performed pursuant to a contract it has with one of the express firms. Mr. Bassett put the number of runs to and from the airport each year at about 3,000.

12. Having set forth the facts of this case, we now turn to consider the question as to which level of Government possesses legislative authority over the labour relations of the respondent. It is now well settled law that as a general proposition labour relations is, *prima facie*, an aspect of "property and civil rights in the Province" pursuant to section 92(13) of the *B.N.A. Act*, and thus within the legislative competence of the provinces. (See: *Toronto Electric Commissioners v. Snider*, (1925) A.C. 396.). However, it is also clear that the Federal Government has jurisdiction over the labour relations of undertakings which by the *B.N.A. Act* are assigned specifically to its jurisdiction. The combined effect of sections 91(29) and 92(10) is to specifically assign to the Federal Government jurisdiction over "works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province."

13. Counsel for the respondent in part based his claim in support of Federal jurisdiction on the basis of the respondent's runs to and from the Sault Ste. Marie airport. It was his contention that not only was the operation of the airport within Federal jurisdiction (a contention that was not disputed by counsel for the applicant), but that the transportation of people and air express to and from the airport was a necessary and integral part of the airport's operation and thus brought the respondent within Federal jurisdiction pursuant to the reasoning of the Supreme Court of Canada in the *Stevedoring* case. (See: *Reference re Validity of Industrial Relations and Disputes Investigation Act*, (Can.), and *Applicability in Respect of Certain Employees of Eastern Canada Stevedoring Co.*, (1955), 3 D.L.R. 721.).

14. Counsel for the respondent did not lead any evidence to seek to illustrate just how "necessary and integral" the respondent's operations are to those of the airport, but relied instead simply on the fact that the respondent carries passengers and express to and from the airport. In our view this fact standing by itself is not sufficient to lead to the conclusion contended for by counsel. While the respondent's operations may well be of some convenience to the organizations it services as well as to the travelling public, we are of the view that such services are not likely to be necessary, or for that matter even reasonably required, for the operation of the airport itself. On this basis we find that the airport runs operated by the respondent are not sufficient to bring its operations within the legislative jurisdiction of



the Federal Parliament. (See: *Re Colonial Coach Lines Ltd. and Ontario Highway Transport Board*, (1967) 61 D.L.R. (2d) 270, which was upheld by the Ontario Court of Appeal at (1967) 63 D.L.R. (3d) 198.).

15. Counsel for the respondent also contended that the number of runs made by the respondent to points outside the Province of Ontario was sufficient to constitute the respondent's operations an undertaking "extending beyond the limits of the Province", as that term is used in section 92(10)(a) of the *B.N.A. Act*, and that it thus falls within Federal jurisdiction. In support of this contention, counsel referred the Board to a number of court decisions. In particular he stressed the following cases, namely *Attorney-General for Ontario v. Winner*, (1954) 4 D.L.R., 657 (J.C.P.C.), *Re: Tank Truck Transport* (1961) 25 D.L.R. (2d.) 161 (Ont. H. Ct.) an appeal from which was dismissed without reasons – see (1963) 36 D.L.R. (2d.) 636; [Ont. C.A.] and *Regina v. Cooksville Magistrates' Court ex parte Liquid Cargo Lines Ltd.* (1965) 46 D.L.R. (-d.) 700 (Ont. H. Ct.).

16. In the *Winner* case it was decided that a bus line's operations may constitute an "undertaking" coming within Federal jurisdiction pursuant to the exception set out in section 92(10)(a) of the *B.N.A. Act*. This case also stands for the proposition that the purely intra-provincial operations of such an undertaking cannot be severed for the purpose of committing them to provincial legislative jurisdiction.

17. The *Tank Truck* case involved a common and contract carrier of goods by truck and tank trailer which was based in Ontario and which conducted most of its business totally within the boundaries of the Province. However, the company did engage in some 630 trips per year outside of the Province. These trips, which represented about 6 per cent of the company's hauls, were not made according to a fixed schedule, although they were made with reasonable regularity. On the basis of these extra-provincial trips, the Court held that the firm was engaged in an undertaking which fell within Federal jurisdiction. In reaching this decision, the Court considered and specifically rejected the argument that if an undertaking was essentially intra-provincial, as opposed to being essentially extra-provincial, then it fell within the jurisdiction of the Province. Excerpts from the Court's decision which touch on this point follow:

at. p. 169

It will have been observed that in the *Winner* case the substantial or essential part of the undertaking was inter-provincial and international and the incidental part was provincial. This is the reverse of the facts in the present case. Based on this factual distinction Mr. Lewis argued that the *Winner* case was authority for the proposition that if an undertaking was either essentially extraprovincial or essentially provincial then the incidental part of such an undertaking, if it is an indivisible one, should go along with the essential part.

at. p. 170

In my opinion the *Winner* case does not support the contention of counsel for the respondent that the interconnecting operation must be the main function of the undertaking to come within s. 92(10)(a). The

inference seems to be the other way and to paraphrase Lord Porter's words at p. 679 D.L.R., p. 581 A.C., p. 248 C.R.T.C., the only question apart from a camouflaged local undertaking, is whether there is one undertaking and as a part of that undertaking does the applicant carry goods beyond the Province as to connect Ontario and Quebec or extend beyond the limits of Ontario into the United States.

at. p. 177

I agree with counsel for the respondent that not every undertaking capable of connecting Provinces or capable of extending beyond the limits of a Province does so in fact. The words "connecting" and "extending" in s. 92(10(a)) must be given some significance. For example a trucking company or a taxicab company taking goods or passengers occasionally and at irregular intervals from one Province to another could hardly be said to be an undertaking falling within s. 92(10(a)). As appears from the Winner case and the Underwater Gas Developers case "undertaking" involves activity and I think that to connect or extend, that activity must be continuous and regular, but *if the facts show that a particular undertaking is continuous and regular, as the undertaking is in this case, then it does in fact connect or extend and falls within the exception in s. 10(a) regardless of whether it is of greater or less in extent than that which is carried on within the Province.* (emphasis added).

18. In the *Liquid Cargo* case an Ontario trucking firm which hauled 1.6 per cent of its total loads to or from points outside of Ontario (which hauls represented only 10 per cent of its total mileage) was held to fall within the jurisdiction of the Federal Parliament. The hauls outside the Province were undertaken on a casual and unscheduled basis. However, as indicated in the following excerpt from the decision, of more importance than the regularity of the extra-provincial hauls was the fact that the company was ready to provide extra-provincial service whenever it was requested to do so by its customers (at pp. 704-705.):

"In my view, the fact that many of the applicant's extra-provincial trips are not made at fixed times in accordance with a pre-determined schedule does not compel the conclusion that its activity in that regard is not continuous and regular. Viewed from the point of view of the applicant company, it is clear that its customers are provided with extra-provincial service consistently and without interruption whenever they apply to the applicant for such service. The applicant stands ready at any time to engage in hauls outside the boundaries of the Province of Ontario at the instance of any of its customers, and for that purpose has gone to the pains and expense of acquiring transport permits and licences from a number of jurisdictions. Further, the evidence is clear that it has made such trips frequently during the period for which figures have been provided."

19. Counsel for the applicant submitted that in determining the issue of legislative jurisdiction the Board should have regard to the realities of the situation before it. It was his contention that the respondent is primarily engaged in the operation of a local school bus

service, and that its extra-provincial trips are merely an incidental part of this operation. As a result, he submitted, the Board should find that the respondent's labour relations are governed by Ontario law. In support of this proposition he referred the Board to two court decisions from Western Canada namely, *Regina v. Manitoba Labour Board Ex parte Invictus Ltd.* (1968) 65 D.L.R. (2d.) (Man. Q.B.) and *Brewster Transport Co. Ltd. v. Amalgamated Transit Union, Division 1374* (Alta. Sup. Ct.) (unreported.). In each of these cases the Court decided that a company which conducted certain limited operations across Provincial boundaries fell within Provincial jurisdiction.

20. In the *Invictus* case, the court made a finding that the company's extra-provincial business was neither regular nor continuous. On the basis of the *Tank Truck* test this alone would have meant that the company's operations fell within provincial jurisdiction. However, the Court appears to have gone on and propounded a second and further test, namely that if a company's business is "essentially and basically" an intra-provincial business, and then the entire undertaking falls within provincial jurisdiction. The Court in the *Brewster* case held that a bus line's seasonal sight-seeing incursions into an adjacent province were merely incidental to "the main, the essential and the primary purpose" of the operation and thus did not constitute the type of connection or extension envisaged by section 92(10(a)).

21. It appears that in each of these two western cases the Court may well have been of the view that if a company's operations are primarily intra-provincial, although at the same time incidentally involving an extra-provincial aspect, then the total operation falls within provincial jurisdiction. If this were the test to be applied to the case before us we would have no hesitation in stating that the respondent's undertaking is essentially intra-provincial and that it therefore comes within Provincial jurisdiction. However, in fact, this type of test was specifically rejected by the Ontario High Court in the *Tank Truck* case and its decision in this regard was upheld by The Ontario Court of Appeal. Further, we are of the view that it would be inappropriate for an inferior tribunal such as this Board to seek to adopt a test or line of reasoning which has already been rejected by the Courts of the Province.

22. We are satisfied on the evidence that the respondent is engaged in what is essentially an intra-provincial undertaking which centres around the services it provides to the two Sault Ste. Marie school boards. However, we are also satisfied that the respondent's vehicles cross into the United States with a fair degree of regularity (albeit that these trips are not evenly spaced throughout the year) and that at least insofar as destinations within the State of Michigan are concerned, the respondent stands ready to make such trips at the request of its customers. This being so we find, on the basis of the Court decisions in *Tank Truck* and *Liquid Cargo Lines.*, that the labour relations aspects of the respondent's operations are outside the jurisdiction of the Ontario Legislature and that therefore this Board lacks the jurisdiction to entertain this application.

23. The application is hereby dismissed.

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**1066-76-U** Ontario Nurses' Association, (Complainant), v. The Board of Health of Haliburton, Kawartha, **Pine Ridge District Health Unit** and H. E. Good, (Respondents).

**S79 – Duty To Bargain In Good Faith – Effect of hard bargaining and imbalance of bargaining power – Effect of unilateral revocation of earlier tentative agreement – Effect of employer refusal to explain firm and final offer.**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members F. W. Murray and O. Hodges.

**APPEARANCES:** *Donald F. O. Hersey, Jean Lowery and Larry Robbins for the complainant; R. A. Werry and H. Good for the respondents.*

**DECISION OF VICE-CHAIRMAN M. G. PICHER AND BOARD MEMBER O. HODGES:** February 15, 1977

1. This is a complaint under section 79 of the Act whereby the Ontario Nurses' Association asks this Board to find that the respondents have breached section 14 of The Labour Relations Act, the statutory duty to bargain in good faith.

2. The complainant is the bargaining agent of the public health nurses employed by the Health Unit of the respondent Board of Health. Mr. H. E. Good is the Business Administrator of the employer and as such was among those responsible for the conduct of negotiations for the renewal of its collective agreement with the Association. The negotiations in question are unresolved to date. They were begun in December of 1975 with a view to negotiating a contract to succeed the agreement between the parties expiring December 31, 1975.

3. At a meeting on January 9, 1976 the parties agreed orally to a number of terms, the principal of which, known as Article XXIII, provided that any impasse in the future renegotiation or renewal of the agreement would, at the request of the Association, be referred to arbitration for final and binding settlement, pursuant to section 34c of The Labour Relations Act. The parties remained apart on a number of other terms, including wages. The impasse continued and the terms which had been agreed to were included in a written document submitted to a conciliation officer of the Ministry of Labour on the 23rd of February, 1976. At that meeting the employer's position on wages was to offer no more than a 5% increase. It was understood that the employer was awaiting its final allocation of funds from the Ministry of Health before committing itself to any more than that. It is also common ground that the Association was then making overtures directly to the Ministry of Health for increased funds to the respondent for the wages of the nurses. Conciliation was unsuccessful and a "no board report" was issued by the Minister of Labour on March 1, 1976, thereby placing the parties in a position to legally strike or impose a lock-out.

4. So matters stood when a negotiation meeting, described by the Association as "hostile", took place on April 29, 1976. The Association then sought on behalf of the nurses a return to the wage parity with hospital nurses which they had in 1974. In the course of that meeting the respondent took the position that it could go no farther than to offer an increase in compensation amounting to 8.62% of its 1975 compensation package. It took this posi-

tion, and so advised the Association, because, in its view, the final budget which it had by then received from the Ministry of Health foreclosed its ability to offer anything beyond that level. The 8.62% also reflected the increase allowable within the Anti-Inflation Board guidelines; the employer therefore saw its offer as constrained by both the funds available to it from the Ministry of Health and the AIB guidelines.

5. The evidence is that the respondent's funding comes from two sources, the Ministry of Health and the municipalities it serves, in 75 per cent and 25 per cent proportions respectively. It appears, however, that the contribution of the municipalities is required to remain within the ceiling of the total figure which is set by the Ministry of Health. In other words, the respondent, unlike a school board, is unable to call for increased operating funds from the ratepayer by an increase in the mill rate. It operates on fixed finances within a closed system whose outside limits are defined by the Ministry of Health. The lobbying activity of the Association reflects a recognition of that reality.

6. At the conclusion of the meeting of April 29, Mr. Good made a comment to the effect that continued impasse could lead to the decertification of the nurses. We accept the testimony of Mr. Good that this was an off-hand remark prompted by the refusal of the Association to accede to his request that the employer's offer be put to the nurses. No actions were taken as a follow up to the comment. We are satisfied that it was not meant as a serious threat nor perceived as such by the members of the Association's bargaining team.

7. Following that meeting the respondent decided to lock out the nurses and it did so from May 10, 1976 to August 30, 1976. The lockout was then lifted, but not as result of a settlement; in the words of Mr. Good, it was lifted because of the needs of the Health Unit in the face of the impending reopening of schools and the then imminent swine flu immunization campaign. The nurses returned to work on the employer's undertaking that they would not again be locked out during the remainder of the year.

8. On June 25, 1976, Mr. Good attended, on behalf of the employer, a convention of the Association of Boards of Health in Toronto. At that convention it was disclosed that a board of arbitration had awarded what was perceived as an unacceptably high wage settlement to public health nurses employed by the Board of Health of the Counties of Leeds, Grenville and Lanark. After some discussion the meeting of the Boards passed a resolution opposing interest arbitration as a means of resolving contract disputes. Mr. Good candidly testified that on the basis of what he learned at the convention and second thoughts which had grown in his own mind since early June he voted in favour of the resolution.

9. That meeting and consultation with other Boards of Health caused the respondent to reconsider its position on Article XXIII, the tentative agreement to interest arbitration. On July 29, 1976, the respondent sent a draft memorandum of agreement to the Association with an accompanying letter advising that the lockout would be lifted if the nurses would accept the respondent's newly proposed agreement. Missing from the employer's draft agreement was the interest arbitration clause. In other words, the respondent revoked its prior agreement to Article XXIII. So matters have stood to this date.

10. The complainant grounds its allegation of bad faith bargaining in three acts: firstly, the threat of decertification; secondly, the refusal to discuss a wage settlement beyond the 8.62% ceiling, and thirdly, the respondent's revoking of its tentative agreement to interest arbitration.



11. Citing decisions of the National Labour Relations Board, the complainant asks this Board for a remedy of considerable breadth. It requests a declaration that the respondent has breached the section 14 duty to bargain in good faith, an order making Article XXIII effective between the parties as though made by final agreement, a finding that the lockout was so related to and coloured by the contemporaneous bad faith of the employer as to be an illegal lockout and, lastly, an order granting compensation to the nurses for wages lost by virtue of the allegedly illegal lockout.

12. There is little doubt that section 79 has provided this Board with broad remedial authority. The precise extent of the remedies available, and the policies that should govern this Board in the exercise of its discretion to grant those remedies must, however, await the case by case development that has previously informed and guided the growth of this tribunal's jurisprudence. An element which the Board always considers before granting a discretionary remedy is the likely effect of the remedy on the collective bargaining relationship of the parties. Such remedies are, therefore, frequently tailored to the particular facts of individual cases. Given that approach the Board's remedial jurisprudence would be ill served by sweeping pronouncements made without reference to the merits of the particular case before it. We turn then, to the merits of the instant complaint. Has the respondent failed to bargain in good faith and make every reasonable effort to make a collective agreement?

13. The scope of the duty to bargain in good faith has been fairly clearly outlined in three recent decisions of this Board. *DeVilbiss (Canada) Limited* [1976] OLRB Rep. March 49; *Canadian Industries Limited* [1976] OLRB Rep. May 199; *Graphic Centre (Ontario) Inc.* [1976] OLRB Rep. May 221. As was stated by the Board in *Devilbiss (Canada) Limited*, *supra*:

The duty reinforces the obligation of an employer to recognize the bargaining agent and, beyond this somewhat primitive purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for "unnecessary" industrial conflict.

The Board necessarily looks to the manner in which the parties conduct their negotiations to determine whether a breach of the duty has occurred. It will infer from their conduct whether there has been demonstrated a refusal to recognize the status of the other party or an unwillingness to engage in the open and rational discussion that is necessary to a sound collective bargaining relationship.

14. It should be stressed, however, that section 14 of The Labour Relations Act is not intended to redress any imbalance of bargaining power that may exist between the parties. A party whose bargaining strength allows it to force the acceptance of hard terms at the bargaining table does not thereby bargain in bad faith. The very word "bargain" presupposes that the parties will seek to maximize their own best interests. Hard bargaining, albeit ruthless, is not bad faith bargaining.

15. Nor will every heated comment made in the charged atmosphere of the bargaining room be a breach of the duty to bargain in good faith. Words may sometimes betray bargaining in bad faith, but the Board must view the words carefully and in the light of all of the surrounding circumstances. Those familiar with collective bargaining know that



fighting words are sometimes no more than a form of posturing for desired effect. And at other times they merely reflect the inevitable fact that when people form hard lines on opposite sides of a tough issue tempers will flare, notwithstanding the best of intentions.

16. Lastly it must be recognized that people are not equally gifted in diplomacy and good manners. While obvious insults may, in some cases, form the basis from which to infer a contempt of the opposite party that is tantamount to a refusal to recognize their status at the bargaining table, or to truly communicate with them, it would be unrealistic to find a breach of section 14 of the Act in every tactless remark that offends one of the parties. Free-wheeling verbal encounter can be a valuable antidote to stalemate in collective bargaining. Therefore, occasional gaucherie and inadvertent slips are inevitable and must, within reason, be tolerated.

17. We are satisfied that the remark about decertification made by Mr. Good at the meeting of April 29, 1976, does not constitute bargaining in bad faith. We accept the evidence of Mr. Good that the comment was not intended as a serious threat to the Association and that it was made out of frustration at a time when he perceived the parties as being at an impasse and on the brink of a lockout. The conduct of the Association at the time and the evidence if its witnesses indicate that the comment was not regarded as a real threat to the Association nor as a refusal of the employer to recognize the Association as the exclusive bargaining agent of the nurses. The earlier and later attitude and conduct of the respondent consistently demonstrated a recognition of the Ontario Nurses' Association as the lawful bargaining agent of the employees.

18. We deal now with whether the employer's refusal from April 29, 1976 to date, to discuss a wage settlement above 8.62% is a breach of its duty to bargain in good faith. Has it thereby refused to engage in the open and rational discussion required by section 14 of The Labour Relations Act? We think that it has.

19. On March 16, 1976 the Board of Health received a letter from the Deputy Minister of Health respecting its 1976 operating budget. That letter stated, in part,

The severe financial constraints affecting the health sector mean that budgets should be prepared on a 10% incremental allowance on the approved 1975 budget for goods and services ... and on 8% global increase on compensation (salaries, wages and certain benefits as specified in the federal regulations) as approved on December 31, 1975.

Attached to the letter is a memorandum entitled,

#### 1976 Funding Guidelines Technical Paper on Anti-Inflation Program

The memorandum states that on January 13, 1976, the Province of Ontario entered into an agreement with the Government of Canada to apply the federal Anti-Inflation Act and Regulations to the provincial public sector and that "The constraint requirements detailed in Part 4 of the Regulations constitute the initial and primary basis for calculating allowable compensation increases". Citing additional provincial policy and Ministry spending limitations as also dictating the budget guidelines, the memorandum goes on to adopt the current AIB guidelines as the Ministry's funding guidelines for salaries and wages for employees below the salary level of \$30,000. It goes on to provide, in part,

- 5) Where adjustments for all or part of 1976 are still to be determined, the permissible percentage rate of increase in compensation calculated for a group in accordance with Sections 45 to 48 of the Regulations constitutes that particular group's *maximum* funding entitlement for the period. However, funds are not available to implement improvements in a health agency that in 1976 exceed an overall average for all employees of 8% on previously approved compensation levels. In other words, any group salary award in excess of 8% (which is in accordance with the federal guidelines) will have to be offset by an equivalent award of less than 8% to one or more other groups.
- 6) The Ministry will not fund those portions of adjustments that exceed (a) a particular group's permissible percentage rate of increase as defined by the Regulations or (b) the total amount for calendar year 1976 for all groups in a health agency derived by applying 8% to compensation levels in effect for each group on its base date.
7. Compensation changes that exceed a group's permissible rate of increase, whether resulting from an arbitration award or otherwise, and that are approved by the Anti-Inflation Board in accordance with Section 44, will not receive supplementary financial support (although the health agencies may be compelled to pay the higher rates). Where the implementation of such an increase is considered essential and costs cannot be contained within the health agency's approved global budget, service or staff cuts will be necessary.

Notwithstanding the foregoing if, following receipt and review of all budget submissions, the Ministry finds that its 1976/77 appropriation is insufficient to fund the aggregate of these budgets, it will be necessary to apply additional budgetary constraints. This action will almost certainly result in service and/or staff cutbacks. *It is therefore stressed that the foregoing represent the guideline maximums for use by a health agency when (a) completing its budget and (b) when negotiating with bargaining units. However, under no circumstances whatsoever should the mistake be made of assuming that for these purposes maximum means minimum.*

20. At the bargaining table, on April 27, 1976, the Board of Health advised the Association that it had received the above budget guidelines from the Ministry and that, pursuant to those guidelines, it had calculated its maximum permissible compensation package increase at 8.62%. It took the position that this was its final offer, that the nurses must accept it or face a lockout and that it would not, indeed could not, discuss any higher wage settlement. In the words of Mr. Good, "There was no more room to move".

21. While an employer must obviously choose a point beyond which it will not go in its wage offer it may not simply stonily assert its final position. It must be prepared to explain the rationale for its decision so that the employees' association can make an informed decision as to its own position in response. A union's decision to invoke a strike or sustain a lockout must not be made in the dark if unnecessary strikes and lockouts, with their attendant economic and social dislocation, are to be avoided.



22. In the instant case the manner in which the employer asserted its final position on wages amounts to a refusal to explain the rationale of its position that is a breach of the duty to bargain in good faith. The evidence before the Board is that the respondent advised the complainant that its position on compensation was determined by two factors: The AIB guidelines and the Ministry of Health's budget guidelines. There is no evidence that the respondent explained or was willing to explain that the two guidelines were in effect one and the same. Nor did the employer show a willingness to explain whether the guidelines were an absolute constraint or whether it could or could not accommodate wages above the guidelines by an altering of budgetary priorities other than laying off nurses and cutting back services. There was no elaboration by the respondent of whether it has the authority to juggle its budget and, if it does, whether it had considered doing so. In *St. Joseph's Hospital* [1976] OLRB Rep. June 255 at 259 the Board, in considering the effect on bargaining of similar, if not identical, Ministry of Health guidelines noted the more binding effect of the guidelines in a province wide bargaining structure as opposed to individual contract negotiations, saying:

It would not be practical within the provincial context, in view of the time constraints which face all bargaining parties as they move towards a resolution, to expect that 59 hospitals could juggle budgets in order to provide additional funds to settle a compensation package above the Ministry of Health guidelines.

In the instant case the opposite seems to be true, and the respondent has offered no rationale to clarify, much less justify, its position in that regard. Indeed it was not until the hearing before this Board that the respondent gave the complainant any explanation of the scheme by which it is funded provincially and municipally. A party in the position of the respondent must be more forthcoming at the bargaining table if it is to meet the standard of discussion required by section 14 of The Labour Relations Act. Disclosure and explanation of an employer's financial position will, in some circumstances, be as necessary to informed bargaining as the disclosure of employee wage data that was ordered by the Board in the *DeVilviss* case, *supra*. Here the failure of the employer to elaborate in any meaningful way the rationale underlying its position on the compensation issue was a breach of its statutory duty to bargain in good faith.

23. We turn now to the final issue. Did the Board of Health further breach the duty to bargain in good faith by reneging on its agreement to Article XXIII, the interest arbitration clause? The revoking of a tentative agreement may well, in some circumstances, be a breach of the duty to bargain in good faith. That will clearly be so when, on the verge of the making of a final agreement a party backs away from its earlier tentative agreement to a major term, having obviously cajoled and deceived the other party in a clear attempt to avoid concluding any final agreement whatsoever. That is, in principle, no different than the lumping-in of surprise demands when final settlement is in sight. (See *Graphic Centre (Ontario) Inc.*, *supra*.) Either tactic is calculated to wreck the framework in which the parties define and come reasonably to rest their mutual expectations.

24. That is not to say, however, that parties may never alter their positions on items tentatively agreed to. Counsel for the complainant argued that absent an express understanding there operates a presumption that terms agreed to prior to the making of an overall agreement must be seen as firmly agreed to. Counsel for the employer responds that without



express notice to the contrary a presumption exists that no term agreed to is firmly agreed to until all items are agreed to and finally ratified. In our view recourse to presumptions is of little help. No two bargaining relationships are the same and each case must depend on the particular relations between the parties at a given point in time. A web of understandings, that are both tacit and expressed, of varying degrees of definitiveness, will operate between them and will colour the quality of their actions.

25. In this case there was no express understanding between the parties on the revocability of agreement on specific terms pending a final overall agreement. The nurses adduced no evidence of any tacit understanding and the Board is not prepared to give great weight to the evidence of Mr. Good that individual items, once agreed to, were considered "off the table". It appears that in the two year bargaining relationship between these parties this issue never presented itself squarely and that their short bargaining life has not yet developed tacit understandings or conventions of any substance. What then is to be made of the respondent's reneging on Article XXIII? Collective bargaining does not take place in a vacuum or in a period where time and events are frozen. Generally, as in this case, it occurs over an extended period of time against a fluid backdrop of events. A party may thus come to reshape its view of its own best interests from one point in time to another and so wish to change its position at the bargaining table. The party opposite cannot be taken to be unaware of the increasing likelihood of that happening with the passing of each successive day and week. The old caution, "Take it before I change my mind" reflects a widely accepted bargaining precept that has its proper application in collective bargaining and in our view, is applicable in the instant case.

26. From January 5th to July 29th, 1976, the Ontario Nurses' Association had the opportunity of concluding a final agreement incorporating the interest arbitration clause. It chose to hold out for a better wage package and to that end it withstood a lengthy lockout. From January to July the value of interest arbitration became increasingly doubtful in the eyes of Ontario's Boards of Health until, in the wake of the Leeds, Grenville and Lanark Health unit arbitration award, interest arbitration was formally discredited at a convention of all Boards of Health. Not surprisingly, out of concern for its own interests, the respondent gradually changed its mind and finally withdrew the tentative agreement it had earlier reached on that item with the nurses. That may be hard bargaining from the viewpoint of the complainant, but it is not bad faith bargaining. The Association took a risk and lost.

27. Turning to the remedy, the Board rejects the complainant's view that the lockout in the instant case was illegal. While it may have been intended to force the nurses to accept terms arrived at through the respondent's misconception of its duty to bargain in good faith, the lockout did not itself reflect either a denial of recognition of the employees' bargaining agent or a refusal to seek an agreement. In this regard we note that during the lockout the respondent made several overtures to the complainant in an effort to conclude a contract, including the initiative that resulted in the lifting of the lockout. On the facts in the instant complaint the lockout was not an act of bad faith bargaining, direct or indirect, nor in any other way a breach of The Labour Relations Act.

28. The failure of the respondent to bargain in good faith is found solely in its failure to explain in any meaningful way the rationale of its final position on the issue of wages.

29. In these circumstances the Board feels that the collective bargaining relationship of the parties will best be served by a declaration and a direction that will correct any misconception that may have caused the breach of the Act to occur. The Board therefore, having determined that the respondent has failed to bargain in good faith and make every reasonable effort to make a collective agreement, contrary to section 14 of The Labour Relations Act, hereby orders the respondent to meet forthwith with the complainant and endeavour, by a process of bargaining consistent with this decision, to bargain in good faith and make every reasonable effort to make a collective agreement.

#### **DISSENT (IN PART) OF BOARD MEMBER OLIVER HODGES:**

1. I concur and join in finding that the remark about "decertification" made by Mr. Good at the meeting of April 29, 1976 does not constitute bargaining in bad faith.

2. I concur and join in finding that the failure of the respondent to explain in any meaningful way the rationale of its final position on the issue of wages, is failure to bargain in good faith.

3. I dissent in the matter of the unilateral withdrawal of the clear and unequivocal agreement to include interest arbitration as a term of the collective agreement which the parties were bargaining to renew. I find the failure of the respondent to disclose deletion of Article XXIII from the Memorandum of Agreement dated July 16, 1976 wherein it *reaffirms its position*, is failure to bargain in good faith.

4. The respondent's proposal to the union of July 29, 1976 offering terms for the lifting of the lockout, stated in part "The Board of Health *reaffirms its position*

and

on signing the attached Memorandum of Agreement the lockout will be lifted ..."

This letter enclosed a copy of a letter from the AIB to the Peterborough County Health Unit, copies of a Memorandum of Agreement, and a reference to AIB approval of the Compensation Plan offered by the respondent to other employee bargaining units and to the ONA unit represented by the applicant.

The Memorandum of Agreement enclosed with this letter included all of the 13 items listed as "Articles in Agreement" recorded at the February 23, 1976 conciliation meeting, except Article 23.01 to 23.06 inclusive, the new interest arbitration provision.

5. The letter of August 13, 1976 from Jean Lowery, Employment Officer of the Union, acknowledges the July 29 letter from Mr. Good, and states in part: "I wish to reaffirm our position which remains the same." There is also a reference made by Jean Lowery to "our meeting on July 20, 1976", in regard to Article 17.01(c), concerning an increase in mileage that had been agreed to. My understanding of the evidence is that Miss Lowery was affirming the position held by the union on April 29.

6. The position of the respondent was clearly stated in the letter of May 14 from the respondent to the applicant:

May 14, 1976

Mr. Larry Robbins  
Employment Relations Officer  
Ontario Nurses' Association  
33 Price Street  
TORONTO, Ontario  
M4W1Z2

Re: Negotiations – Board of Health and Ontario Nurses' Association  
Local 106 – Ontario Nurses' Association

Dear Mr. Robbins:

In the event there is any misunderstanding regarding ratification of an agreement, please be advised that the Board of Health is willing to sign a Memorandum of Agreement incorporating those articles as presented at the meeting held April 29th, 1976. This of course includes the Salary Schedules as presented at that time.

Yours truly

R. E. Good  
Business Administrator  
Copy to: Mrs. Joy Parliament, Vice President  
REG:jo

7. The Minutes of the Board of Health meeting held May 25, 1976 record Minute # 15:

#### REMARKS, MEDICAL OFFICER OF HEALTH

15. Dr. Blackwell advised that he was of course concerned with the lockout of the nurses and was under the impression that the nurses were not aware that they could approach the Board of Health at any time. It was reiterated that *the Board of Health is willing to sign a memorandum of agreement incorporating those articles presented at the meeting held April 29, 1976 including the salary schedule as presented at that time.*

(emphasis added)

Minutes of Board of Health meetings subsequent to the May 25, 1976 meeting were also entered in evidence. The dates of these meetings are:

June 15, 1976  
June 29, 1976 (Committee Meeting)  
July 28, 1976  
September 21, 1976.



The meeting of June 15, 1976 adopted the Minutes of May 25, 1976 meeting without amendment.

8. The Minutes of the Board meeting of July 28, 1976 record Minute #3, as follows:

#### ONTARIO NURSES' ASSOCIATION – NEGOTIATIONS

3. The proceedings of the Negotiating Committee were reviewed including the meetings called by Mr. Stevens, Mediator, Labour Relations Board, which were held June 1, 1976 and July 20, 1976. The Chairman and Business Administrator also attended the following meeting at which the negotiations between Boards of Health and the Ontario Nurses' Association were reviewed: Meeting with Dr. Stephenson, Minister of Labour June 21, 1976, meeting of the Association Ontario Boards of Health June 25, 1976 and meeting of the Executive of the Association Ontario Boards of Health July 9, 1976.

A letter dated July 20, 1976 received by the Board of Health of Peterborough County Health Unit from the Anti-Inflation Board was presented and copies distributed to the members.

*Mrs. Parliament, President of Local 106, Ontario Nurses Association and Miss Hillier were requested to join the meeting and the above letter was given to each.*

Moved by Mr. Ridgeway – Seconded by Mr. Vosburge THAT a letter be forwarded to the Employment Relations Officer of the Ontario Nurses' Association representing Local 106 advising –

THAT the Board of Health *reaffirms its position*, and

THAT *on signing the attached Memorandum of Agreement the lock-out will be lifted*, and

THAT a copy of the letter dated July 20, 1976 received by the Board of Health of the Peterborough County Health Unit from the Anti-Inflation Board be attached to this letter.

(emphasis added)

It was this Board meeting that "*reaffirms its position*", as stated in the July 29, 1976 letter to the applicant.

It appears from these Minutes that ONA Local 106 President Joy Parliament was present at part of the July 28, 1976 Board meeting and received a copy of the AIB letter to the Peterborough County Health Unit.

There is no evidence up to this point that the respondent had departed from its position as expressed in the May 14 letter to the applicant; that is to say, the interest arbitration clauses had not been withdrawn by the Board of Health as a matter of policy, regardless of the attitude of Mr. Good toward that major proposal of the union. There is no evi-

dence that the Local President was informed of any change in the respondent's position, although she was present at the Board meeting where the respondent "reaffirms its position". It is of interest to note that the "Memorandum of Agreement" conveyed by the letter of July 29 is dated July 16, 1976. There is no evidence that the July 16, 1976 document was a "new" position that had been discussed by the parties, a clear pre-condition to "reaffirmation". Paragraph 9 of the majority decision refers to "the respondent's *newly* proposed agreement". With all respect to the close attention my colleague would have given to the evidence, nowhere can I find any evidence of a "*newly* proposed agreement", or of any reconsideration of Article XXIII having been discussed or acted on by the Board of Health at the July 28, 1976 meeting.

9. The September 21, 1976 meeting of the Board of Health records Minutes #8 and #9:

#### ONTARIO NURSES' ASSOCIATION, LOCAL 106

8. The Chariman of the Negotiating Committee advised the members of the Board of the state of negotiations with the Ontario Nurses' Association and the Ontario Nurses' Association had indicated that they would accept the offer made by the Board provided the Board would include an article of compulsory arbitration and an article on principle of parity with pay for nurses in hospitals in the agreement. It has also been indicated that the Ontario Nurses' Association was making application to the Labour Relations Board to have compulsory arbitration legislated so that it would be included in all future contracts. The Board was also advised that the complaint filed with the Labour Relations Board had been withdrawn.

#### COMPULSORY ARBITRATION

9. A letter from the Chairman of the Board of the London Middlesex Health Unit and a letter from the Chairman of the Board of the Simcoe County Health Unit were presented to the Board.

Moved by Mr. Roddy Seconded by Mr. Vosburgh THAT the Business Administrator forward a letter to the Minister of Labour advising her that the views expressed in the letters from the Chairman of the London Middlesex Health Unit and the Chairman of the Simcoe County Health Unit be endorsed.

It is clearly evident from Minute #9 that the respondent Board of Health had not earlier adopted a policy opposing compulsory (interest) arbitration. It is equally clear from Minute #8 that the applicant had not abandoned its position on that matter.

10. My colleagues indicate by the word "tentative" in para. 10, 23, 24 and 26 of the majority decision that they attach no firm settlement or agreement on *any* matter brought to the bargaining table, until *all* matters are accepted by the parties and the collective bargaining agreement is in writing and signed by the parties. The decision of the majority is the decision of the Board, and it would therefore appear open to fairly interpret the majority deci-

sion as Board policy. In Board File 1449-76-U (*Kodak Canada Ltd.*) Chairman D. D. Carter, February 8, 1977, the status of a Board decision as it affects the regulation of labour relations in Ontario is succinctly expressed in paragraphs 9 and 10:

9. Although grievance arbitration is the proper forum for the resolution of matters relating to individual collective agreements, *it is the Labour Relations Board that has been entrusted with the responsibility for resolving matters that go to the general structure of collective bargaining in this Province. Where such matters arise, therefore, it is this Board that provides the proper forum for their resolution*, and deferral to grievance arbitration can no longer be the appropriate response.
10. *The matters raised by the parties in the instant case have implications that extend beyond their own collective bargaining relationship.*  
(emphasis added)

In this case the evidence is that the practice of the parties was to accept a clause as settled when there was agreement on the content of a particular clause. This practice had been followed in the preceding (the first) collective bargaining negotiations, and was continued in the negotiations for this, their second agreement with which we are here concerned. This practice is clear from the testimony of the respondent's witness, Mr. Good, in cross-examination:

- Q. In the Ontario Nurses' Association negotiations, these or others, was anything agreed to be binding?
- A. Yes.
- Q. Was there an understanding that as each item was settled ...
- A. Yes. Once we agreed on an article, it was off the table. That was the practice.

Counsel for the respondent re-examined his witness on the practice of accepting settled clauses as being "off the table". The witness further confirmed the practice and indicated there had been no incident to the contrary. In the light of this testimony of the Business Administrator, Mr. Good, the use of the word "tentative" by the majority when referring to the settled position of the parties as adopted by the Board of Health meeting of May 25, 1976, is at least perplexing. There is no evidence whatsoever to support that conclusion. The evidence is all to the contrary.

In my opinion, the practice of settling matters seriatim, clause by clause, and working thus to narrow the gap between parties step by step is eminently sensible. By the logical progression of settling one issue at a time, the collective agreement is put together by agreement upon least contentious matters first, so that the area in dispute is reduced as far as possible and the major differences isolated.

To refer to the clauses agreed upon and formally ratified by the Board of Health on May 25, 1976 and confirmed by adoption of that Minute at the subsequent Board of



Health meeting of June 25, 1976, as "tentative" simply helps to excuse the Board of Health for what I find inexcusable and offensive to good faith bargaining in this case. Here these proprieties were founded upon the practice of the parties, which was clearly not "tentative" in their manner of proceeding clause by clause.

11. The testimony in chief of Mr. Good was that the interest arbitration clause was removed because the Board thought it wrong to allow a third party to decide issues. This thought only occurred after interest arbitration "went beyond what the Board would have done" in one of the other Health Units. Mr. Good further testified in chief that since ONA representatives didn't ask why the interest arbitration Article XXIII was missing from the July 16, 1976 Memorandum of Agreement, he didn't offer an explanation. Mr. Good is not a novice at the collective bargaining table. Questioned by the Chairman of this Panel of the Board as to how many contracts he had been involved in, Mr. Good replied, "This was the second time with ONA, and there were three sets of negotiations for other staff with CUPE", indicating he had been involved in all of these.

Cross-examined concerning his letters of July 29, 1976 to ONA and the absence of any reference therein to the missing Article XXIII from the Memorandum of Agreement sent with that letter, Mr. Good testified that there was no specific discussion regarding the withdrawal of the Article. Asked whether there was any discussion of the legality of that move at the June 29, 1976 Board of Health Committee Meeting, the witness testified that there was none. It is my understanding of the evidence, as seen from Minute #9 of September 21, 1976 Board of Health meeting that the Board of Health only then moved to oppose interest arbitration.

12. On August 23, 1976 the ONA agreed to return to work without signing an agreement, with the understanding that negotiations would go on. At this time, while there is some conflict in the evidence on the point, I conclude that the union knew that the respondent had recanted on Article XXIII. However, my finding that the respondent failed to bargain in good faith in this matter rests on the lack of disclosure in the July 29, 1976 letter proposing an end to the lockout.

13. In summary, there are two aspects of the respondent's conduct on this point which I consider to be tainted with bad faith. There is first the failure of the respondent to disclose in its letter of July 29 the deletion of Article XXIII from the proposed Memorandum of Agreement. Lack of disclosure of this kind creates a feeling of untrustworthiness which can only disrupt a bargaining relationship and should not be condoned by this Board. Secondly, and more importantly, there is the revocation of the agreement to include Article XXIII in the collective agreement. The evidence discloses that once a matter was agreed to it was considered to be "off the table". Although no evidence of this practice was adduced by the applicant, that was not necessary given the testimony of Mr. Good, the respondent's witness. By recanting on Article XXIII in light of an accepted practice of taking items "off the table" once agreed to, the respondent acted in a manner which can only be considered bad faith.

14. My order as to remedy is that the respondent be directed to reinstate Article XXIII as part of any final settlement and collective agreement the parties may sign. I am aware that my order would impose a degree of content in the collective agreement and that such a unique remedial technique has not been utilized to date by this Board. But the wide

remedial authority given to the Board in section 79 of the Act combined with the particular facts of this case demand that such an order be made. To say the Board has not issued such an order previously is merely to say that no factual situation has arisen in the past which called for such an order. I find that the facts in this case, particularly with respect to the second aspect of bad faith referred to above, call for an order directing the inclusion of Article XXIII in any future collective agreement.

#### **DISSENT (IN PART) OF BOARD MEMBER F. W. MURRAY**

1. I concur in the result of the Chairman's decision respecting the remark about decertification and the change of position of the respondent on the issue of interest arbitration.
  2. I would dissent, in part, however from the conclusion of the majority decision regarding the alleged refusal of the employer to sufficiently explain the rationale for the position it took on wages at the meeting of April 29th, 1976 and thereafter. The principle stated in the decision of the Chairman is one with which I do not disagree. Both parties to negotiations must be prepared to elaborate to some degree the reasons that underlie their stated position. This is especially so when the parties are at or near the point of impasse. In my view, however, the overall conduct of both parties must be closely scrutinized before the failure of one party to explain its rationale may be characterized as a breach of the duty to bargain in good faith.
  3. In this case the conclusion of the majority fails to take into account the attitude of the complainant association in the face of the employer's position. The evidence does not show that the nurses made any protest of the employer's attitude at the April 29th, 1976 meeting. They did not expressly demand to have explained the employer's reasons for its position nor seek any elaboration of the respondent's system of funding and budgeting. In my view the most likely inference is either that they knew of the employer's financial position and therefore did not ask, or if they did not know, they did not care enough to ask and were content to carry the issue of wages directly to the door of the Minister of Health. Either way, in view of their own passive posture at the time, they should not now be permitted to object to the employer's attitude as being not sufficiently forthcoming.
  4. While I do not disagree with the principle of disclosure stated in the decision of the Chairman and also reflected in the *St. Joseph's Hospital case*, I would find on the facts that there has been in this case no breach of the duty to bargain in good faith.
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**1274-76-U; 1276-76-U** Local Lodge 2506, International Association of Machinists and Aerospace Workers, (Applicant), v. **Ralph Milrod Metal Products Limited – ITT Canada Limited**, (Respondent).

**Lock-Out – Discharge – Whether mass discharge during term of collective agreement a lock-out.**

**Before:** A. L. Haladner, Vice-Chairman, and Board Members J. D. Bell and P. J. O’Keeffe.

**APPEARANCES:** *H. Goldblatt, Joseph Atkinson and R. B. McMillan for the applicant; E. L. Stringer, Q.C. and William Argue for the respondent.*

**DECISION OF A. L. HALADNER, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL:** February 28, 1977

1. On October 19, 1976, Ralph Milrod Metal Products Limited (the “Company”) a subsidiary of ITT Canada Limited discharged all but 2 of 32 employees employed on its “Chevy Truck” assembly line. The nature and manner of these discharges were the subject of seven days of hearings before the Board. Local Lodge 2506 International Association of Machinists and Aerospace Workers (the “Union”) filed a complaint under section 83 of The Labour Relations Act alleging that the discharges amounted to an illegal lockout within the meaning of the Act. The Union is seeking a declaration that the Company called or authorized an illegal lockout, as well as a direction requiring the Company to reinstate the discharged workers.

2. The Company operates a medium-sized production facility in Mississauga, employing a little over 200 employees. The plant, which is basically a punch press operation, produces metal stampings for use in light cars and trucks. All the discharged workers operated punch presses on a line that produced Chevrolet truck dashboards.

3. The Union has had a number of collective agreements with the Company. The current agreement has been in effect since March of 1976. It is not disputed that if the conduct of the Company amounted to a lockout, it was illegal under section 63 of the Act.

4. Mr. William Argue, the General Manager of the Company, and the person responsible for the decision to dismiss, was the principal witness for the Company. Mr. Argue commenced employment with the Company on October 13, 1974, as manager of manufacturing and served in that capacity until September of 1975 when he assumed his present position as General Manager. Mr. Argue told the Board that when he joined the Company in October of 1974, the level of production on the Chevy Truck line and throughout the plant in general was extremely low in relation to the production standards which was then in effect. Mr. Argue gave evidence, which we accept, that he therefore personally reviewed the standards over a period of approximately two months, using recognized industrial engineering methods, to determine whether they were reasonable. His conclusion was that the low level of productivity throughout the plant was representative of poor performance against a reasonable standard of production and that, if anything, the existing production standards were too easily achieved. At the time of Mr. Argue’s entry into the plant, the production standard on the Chevy Truck line was 2,080 pieces for an 8-hour shift, and it is significant



that this is the standard which has remained in effect to the date of the Board's hearing. After checking the production standards, Mr. Argue then proceeded to develop a three-stage program to get the plant operating on an efficient level. The first two stages of the program, which were projected to take between a year and a half to two years complete, involved respectively the introduction of a supervisory training program and the introduction of a number of work methods changes, both of which were designed to improve efficiency. The final phase of the program, which was to be initiated upon completion of the first two, was to involve a complete re-evaluation of production standards on a plant-wide basis.

5. About the beginning of 1975 the first two stages of the program were implemented, and by approximately mid-March of that year, production on the Chevy Truck line had improved to what was regarded by the Company as an acceptable level. Mr. Argue gave evidence, which the Board accepts, that production on the Chevy Truck line reached a level of approximately 1,800 pieces per 8-hour shift at that time and that it remained consistently at that level until late August, 1976, when the employees of the Company engaged in a plant-wide walkout which was held by a previous panel of this Board to be illegal. His evidence was that while the standard on the Chevy Truck line was 2,080, the Company was prepared to accept 1,800 until the third phase of the program was completed.

6. As indicated, the employees went on strike in late August of 1976. The decision of the previous panel indicates that the walkout began on August 26, when a group of employees refused to report for work after punching in, and that by August 27, all but a handful of the Company's employees were out on strike. The evidence before this panel established that during the course of the strike, the Company held a number of meetings with the Union in an effort to get the employees back to work. Although the underlying causes of the work stoppage did not emerge clearly from the hearing, the evidence establishes that in the course of these meetings, the Union presented the Company with a list of three demands on behalf of the striking employees. First, that the Company make immediate payment of certain monies which had been held pending a ruling by the Anti-Inflation Board; second, that the Company remove a one-day suspension which had been imposed on the President of the Union, Rahim Siraj; and third, that the Company agree to take no disciplinary action against the employees who had participated in the walkout. The evidence establishes that the Company made various proposals to the Union during the course of these meetings. However, none of the proposals were accepted, and the Company was ultimately forced to seek relief from the Board. In a decision dated September 3, 1976, the Board found that the employees had engaged in an illegal strike and issued a cease and desist order under section 82 of the Act in respect of some 125 named employees.

7. The evidence establishes that the Union's shop committee was in the Company's boardroom on September 8, when the Board's order was received by the parties and that the committee indicated at that time that it would require something from the Company in addition to the Board's order to get the employees back to work. As a result, the Company gave the following message to the shop committee to be conveyed to the Union membership:

The Ontario Labour Relations Board has declared your strike to be unlawful and ordered you back to work. If you return to your next regularly scheduled shift:

1. You will not be terminated as a result of your participation in the work stoppage which commenced on Thursday, August 26, 1976 and Friday, August 27, 1976.
2. Any discipline which may be implemented shall be on a uniform basis so that all employees will receive the same degree of discipline although such discipline may be implemented at different times. Employees who have been absent on leave, on sick leave or on vacation will not be disciplined.
3. The one day suspension of R. Siraj will be fully re-investigated by the Company before it decides whether to implement the suspension or drop it completely.

8. In addition to the enumerated undertakings, the Company agreed to meet with the Union to discuss outstanding problems once its operations had resumed, and the Union was requested to provide the Company with an agenda outlining the areas which it wished discussed. Mr. Argue testified that the request for an agenda was intended to provide the Company with an opportunity to respond to the Union's proposals with some kind of investigation behind it.

9. Apparently the Company's letter was acceptable to the employees for they returned to work on Thursday, September 9. The evidence establishes that on the following Monday, September 13, Mr. Argue had a discussion with the business agent of the Union, a Mr. C. Freese, during which Mr. Argue indicated that the Company had not yet received the Union's agenda. On September 16, Mr. Argue sent a letter to Mr. Freese reiterating the Company's request for an agenda and re-affirming its commitment to meet with the Union and discuss outstanding problems. On or about September 18, Mr. Argue was requested to meet with the committee September 23rd and was advised that an agenda would be forthcoming by the 21st. However, the evidence establishes that the Company did not receive the Union's agenda until 7:00 a.m. on the morning of the 23rd. Here is what that agenda looked like:

The following are the items that the Local Union requests discussion on with the Company, commencing Thursday, September 23, 1976:

- Production Standards.
- 3-day suspension that the Company has indicated they will impose on all employees.
- 1-day suspension of Rahim Siraj.
- Safety problems in the plant.
- Company's application to Ontario Labour Relations Board dated Sept. 9, 1976.
- Verbal and written warning to employees due to alleged low production.

– Any other items for the good and welfare of the employees during their working hours with the Company, which may come up as a result of discussion on any of the above items.

10. It will be observed that production standards is the first item on the Union's agenda and that safety problems in the plant are the fourth. Mr. Argue gave evidence, which the Board accepts, that the Company had not received any indication prior to the receipt of the Union's agenda that the issue of production standards or plant safety was of concern to the Union.

11. The meeting with the Union took place at 9:30 a.m. on the morning of September 23rd as scheduled and lasted for approximately one hour. Immediately upon the completion of that meeting, Mr. Argue drafted and sent the following letter to the Union:

**SUBJECT: RESPONSE TO AGENDA ITEMS 9/23/76**

**a. PRODUCTION STANDARDS**

A specific program to review and, if necessary, revise production standards will be commenced in the first quarter of 1977. It is anticipated that four to six months will be required to cover the full range of operations. It is the Company's desire that members of the Union (3-4 maximum) be involved in the program so that a full understanding may be achieved.

**2. THREE DAY SUSPENSION/COMPANY POLICY GRIEVANCE**

At various stages during the unlawful strike the Company waived disciplinary action if the employees would return to work within specific time limits. These guarantees were made in writing to the Shop Committee and were ignored completely. When the workers were ordered back to work by the Labour Relations Board, the Company reserved the right to impose discipline. The discipline was determined to be a three (3) day suspension awarded to each employee who participated in the unlawful strike. This discipline will be imposed.

The Policy Grievance submitted by the Company will be pursued according to the grievance procedure outlined in the Collective Agreement.

**3. R. SIRAJ – SUSPENSION**

Per our agreement, the Company completely re-evaluated the circumstances surrounding this suspension and found that it was valid. The suspension will remain on record and will have to be served.

**4. SAFETY**

The Company is in complete agreement with the Union members' desires to have a safe plant. The Company pointed out that a Safety Com-



mittee did meet, but that these meetings fell off due to lack of Union participation. The Safety Committee meetings will be held on a monthly basis and minutes will be published for all to review. The Shop Committee will notify management of the Union representatives names.

#### 5. CONSENT TO PROSECUTE

This application was raised with the Labour Relations Board at the time of the unlawful strike and is currently scheduled for hearing October 6. If the consent were to be upheld by the Labour Relations Board, each individual who participated in the unlawful strike would be liable to a Government imposed fine of up to \$1,000. per day for the period he/she was on on [sic] strike.

The Company has agreed to withdraw action on this consent if the daily productivity of the employees returns immediately to its pre-strike levels and is maintained.

#### 6. CURRENT DISCIPLINE

If the productivity returns to its pre-strike levels and is maintained, the Company will remove all disciplinary action awarded for production reasons between September 8, 1976 and September 24, 1976. It was agreed by the Shop Committee and Management that all grievances arising from these discipline issues would be held for processing until October 29, 1976. Disciplinary actions awarded after September 25, 1976 are not subject to this review.

#### 7. NON-AGENDA ITEMS

The Shop Committee and Management agreed to meet once a month to discuss items of mutual interest.

Minutes of these meetings would be taken and published. Grievances would not be discussed at these meetings. Each party would provide the other party with a list of agenda items one week prior to the meeting date.

12. There are a number of points to be made about this letter. First, as regards the Company's promise of a plant-wide production standards review program to be commenced in the first quarter of 1977, Mr. Argue testified that although plans for a production standards review program had been in existence since the beginning of 1975, September 23, 1976, was the first occasion upon which the Company had committed itself to such a program. Second, a reading of paragraphs 5 and 6 of the Company's response indicates quite clearly that the objective of the Company was to secure a return to, and a maintenance of, the pre-strike levels of production, pending the outcome of the production standards review program. It will be noted that by the date of the Company's letter, September 23, 1976, the employees had been back to work for two weeks. Mr. Argue's evidence, which the Board ac-

cepts, was that while production in the plant had, for the most part, pretty much returned to normal by that time, the Company had observed a significant decline in production on the Chevy Truck line. At the hearing, much was made of the fact that the Company's insistence upon a return to the pre-strike production levels did not refer specifically to the Chevy Truck line. However, the Board does not attach any particular significance to this fact. Mr. Argue's evidence, which we accept, was that while the Company's specific concern was with the Chevy Truck line, the response to the Union's agenda had been drafted in general terms because of a concern that the problem on that line might spread to other areas of the plant. Finally, as regards the parties' agreement to meet once a month to discuss items of mutual interest, Mr. Argue stated that the suggestion for these meetings had come from the Company, the idea being to provide a discussion forum of non-confrontation.

13. Mr. Argue gave evidence, which the Board accepts, that following the meeting on September 23, production on the Chevy Truck line continued to deteriorate to a significant degree. As a result of this further deterioration in production, Mr. Argue directed Mr. Evans, the plant superintendent, and Mr. McDonald, the Company's production and material control manager, to hold meetings with the employees on the Chevy Truck line to advise them that the Company was of the view that production was below a satisfactory level, that it could see no reason for the decline in production apart from a slowdown on the part of the employees, and that the Company wanted production to return to the pre-strike levels. Mr. Argue testified that Mr. Evans and Mr. McDonald were also instructed to determine whether there were any new factors of which the Company was unaware that were preventing the achievement of the pre-strike production levels.

14. Mr. McDonald gave evidence before the Board. His evidence, which we accept, was that pursuant to Mr. Argue's instructions, he and Mr. Evans held meetings with the employees on October 4th, 5th and 6th and communicated the Company's position on production. He also testified that he made written notes of all the complaints which were voiced by the employees on the Chevy Truck line and that these complaints were then passed on to Mr. Argue.

15. The evidence establishes that Mr. Argue met with Mr. Evans and Mr. McDonald after the aforementioned meetings and that they concluded there were no extraordinary factors preventing a return to the pre-strike levels of production.

16. Mr. Argue gave evidence, which the Board accepts, that there was very little change, if any, in production on the Chevy Truck line after the meetings and that he therefore directed Mr. Evans and Mr. McDonald, on October 14th, to hold another meeting with the employees to advise them that the Company could see no reason for the continuing low levels of production except for a slowdown on their part, and that if they did not immediately return production to the pre-strike levels, they would be subject to discipline up to, and including, discharge.

17. The evidence establishes that Mr. Evans and Mr. McDonald met with the employees in the plant cafeteria on October 14th as instructed. The evidence also establishes that Mr. Argue was summoned to the cafeteria during the course of that meeting by Mr. McDonald who told him that the employees on the Chevy Truck line were refusing to go back to work and would walk out if Mr. Argue did not appear within five minutes. Mr. Argue then went immediately to the cafeteria and told the employees in attendance what he

had instructed Mr. Evans and Mr. McDonald to tell them and also that they were to return to work. They did return to work. However, production continued at the previous low levels. By the end of October 18th, production had not improved, and on October 19th, a decision was made to discharge all the employees on the Chevy Truck line who had participated in the illegal August/September strike. Mr. Argue's evidence was that two of the employees on the line had not participated in that strike and that they were given suspensions for their part in the slowdown.

18. The reason given to the employees for their terminations is contained in this letter, a copy of which was sent to each employee on October 19:

The Ontario Labour Relations Board did, by its September 8, 1976 decision, declare that employees of this company were engaging in an unlawful strike, and directed the named employees "to cease and desist from engaging in an unlawful strike ...".

The definition of "strike" as contained in the Ontario Labour Relations Act includes "... a *slowdown* or other concerted activity on the part of employees designed to restrict or limit output".

Since your return to work following the walkout employees on the Chev Truck line, of which you are one, have been engaging in a definite slowdown. Such slowdown is therefore, a continuation of the strike which was prohibited by the Labour Board's decision.

We have, on several occasions since the return to work, met with employees on the Chev Truck line, including yourself, in an effort to determine if there are any reasons for the sharp reduction in production and to try to persuade you to end your slowdown. As a result of those meetings we have concluded that there is no other significant reason for the reduced production except the slowdown and return to normal production.

We feel we have been most patient and have made every reasonable effort. Your continued refusal to co-operate with our efforts or to comply with the Labour Board's decision leaves us no alternative but to terminate your employment with this company.

Your termination is effective as of this date. Any monies owing and appropriate documents will be mailed to you.

19. At the hearing, Mr. Argue testified that the decision to discharge was his, but that it had been discussed with and had received the concurrence of his superiors at corporate headquarters in Detroit and New York. In explaining the rationale for the decision to discharge such a large number of employees, Mr. Argue stated that the employees on the Chevy Truck line had been given repeated warnings about their production and had been told on the 14th that they would be subject to discharge if their production did not increase; and that faced with what it considered to be a concerted effort on the part of all the employees on the line, the Company concluded that it had no alternative but to terminate the em-



ployees as a group. He also stated that the Company was merely seeking a return to the pre-strike production levels and that the employees would not have been terminated had production showed any signs of improving after the October 14th meeting.

20. The evidence established that some of the discharged employees were employees of long standing seniority and that some had not worked regularly on the line until after the strike. When questioned about this at the hearing, Mr. Argue stated that all the employees on the Chevy Truck line were qualified punch press operators and that it should only have taken a qualified punch press operator two or three days to work up to the pre-strike level of 1,800 pieces per 8-hour shift. (It should be noted here that the evidence of the Union established that the Company's practice in the past had been to move employees frequently throughout the plant and, in fact, there were complaints about this practice at the hearing.) Mr. Argue stated further that all the employees had been made aware of the need for production. But beyond that, he was quite candid in admitting that, apart from establishing that all the employees who were terminated had participated in the illegal strike, the Company had made no other assessment of the individual situations of the discharged workers and that the decision to dismiss had been made without regard to their work records. As Argue put it: "All who participated in the strike were fired. Those who did not were suspended".

21. The evidence also established that some of the employees on the Chevy Truck line were dependent upon the machines immediately in front of them for material and, further, that those employees were processing all the material which came to them down the line. Mr. Argue's explanation for this was that the employees were all aware of the need for a return to the pre-strike production levels and that they all had an ability to run their presses from the material banks which were located on the production floor. In this regard, he told the Board that he had instructed his supervisors to tell the employees to use the banks.

22. Section 1(1)(i) of The Labour Relations Act defines a lock-out in the following terms:

(i) "lock-out" includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees;

23. In contrast to the statutory definition of strike which requires only that the work stoppage, or other disruption of work, result from the combined or concerted effort of employees (see *Domglas Ltd.*, [1976] OLRB Rep. Oct., 569), the definition of lock-out comprises both an objective and a subjective element. It requires not only that there be a closing of a place of employment, a suspension of work or refusal to employ, but also that there be a purpose to compel or induce employees to refrain from exercising rights or privileges under the Act or to agree to provisions, or changes in provisions, respecting terms or conditions of employment ...

24. As the Board pointed out in *Harry Woods Transport Limited*, [1976] OLRB Rep. July, 341, whether or not an employer's action in a particular case amounts to a lock-out will depend on the employer's underlying motivation. This is because the purely objective occurrence of a termination or suspension of employment is not in and of itself something which the Act restricts to a particular period of time (as it does in the case of concerted employee activity which results in a disruption of the employer's operation). The termination or suspension of employment by an employer, be it the closing down of a plant, the contracting-out of work or the lay-off or discharge of employees, only becomes a lock-out under the Act (and thus illegal during the term of a collective agreement or before the exhaustion of the conciliation process) if it is taken for a purpose which is encompassed by the statutory definition of lock-out.

25. There are two distinct purposes which are encompassed by section 1(1)(i) of the Act, either of which will satisfy the subjective requirement of the statutory definition. The term "lock-out" is normally used in the labour relations context to signify a refusal on the part of an employer to furnish work with the objective of bringing pressure to bear on its employees to compel them to agree to more favourable terms of employment. That is the kind of purpose which is expressly embraced by the words "with a view to compel or induce employees to agree to provisions or changes in provisions respecting terms or conditions of employment ...".

26. There is, however, a second kind of coercive activity on the part of an employer which will qualify as a lock-out under The Labour Relations Act. As the definition makes clear, an employer engages in a lock-out if it refuses to employ with the objective of compelling employees "to refrain from exercising any rights or privileges under the Act". In this connection, the Ontario definition of lock-out should be contrasted with the definition of lock-out contained in the British Columbia and Canada Labour Codes. Neither of those statutory definitions contain any explicit reference to a purpose of compelling employees to refrain from exercising statutory rights. They both require, on their face, a purpose of compelling an agreement in respect of terms or conditions of employment.

27. Can the employer's conduct in the present case be considered a lock-out? The answer to that question turns on whether the reasons advanced by the employer for the October 19th discharges are consistent with the evidence of the circumstances surrounding those discharges. If they are not, then that may give rise to an inference that the real motivation behind the discharges was something other or more than simply to return the Chevy Truck line to its pre-strike production levels. What does the evidence tell us about the employer's underlying motivation?

28. The evidence establishes the employer suffered an almost total cessation of its operations as a result of a plant-wide illegal walkout in the period from August 26 to September 8, 1976. The evidence also establishes that within a few days of the employees' return to work on September 9, production on the Chevy Truck line had decreased significantly. By September 23rd, it was clear to the Company that it had a problem, and in its response to the Union's agenda, the Company indicated in no uncertain terms that it was seeing a return to the pre-strike production levels. The letter did not solve the problem, however, and in fact the situation on the line continued to deteriorate. In the first week of October, the Company held meetings with the employees and told them directly of management's concern with their low production. At these meetings, the employees on the Chevy Truck line



were told that the Company could see no reason for the low levels of production apart from a slowdown on their part. At these meetings, the employees were asked whether there were any reasons of which the Company was not aware which were preventing a return to the pre-strike production levels and a written record was made of all employee complaints. These complaints were subsequently evaluated by the Company which concluded that there were no new factors which might explain the sharp drop in production. There was no significant movement in the levels of production back to the pre-strike levels, and on October 14th, the Company held a second meeting with the employees. Again the employees were asked whether there were any new factors which might explain the continuing low levels of production and this time the employees were told that if production did not promptly return to the pre-strike levels, disciplinary action up to, and including, discharge would be taken. On October 19, the Company was faced with what was clearly a difficult and frustrating situation. Production on the Chevy Truck line was well below the pre-strike levels, and no acceptable reason therefor had been vouchsafed to the Company. The employees on the line had been warned of the possible consequences of their actions, and the Company could see no evidence that the warnings were having any effect. Something obviously had to be done to get production back on the track, and so a corporate decision was made to fire all the employees who had participated in the September/October walkout, and no doubt as well to face whatever legal or other consequences would arise as a result of that action.

29. The evidence establishes that the discharges were taken without regard to the seniority, work records, or relative degree of culpability of the 30 individuals involved. While this Board does not for a moment condone such a high-handed and indiscriminate exercise of management's disciplinary authority, the response of the Company was certainly not, on the face of it, inconsistent with its stated objective of returning production on the line to its pre-strike levels.

30. It will be recalled that Mr. Argue testified that the employees on the Chevy Truck line were fired for engaging in a concerted slowdown which was regarded by the Company as a continuation of the August/September strike. The Union argued that it had not been established that the employees who were fired were acting in concert as is required by the definition of "strike" and further, that it had not been established that the employees' conduct was a continuation of the previous strike.

31. This argument of the Union confuses the Company's motive in the discharges with its justification for same. The evidence establishes that there was a significant decrease in production on the Chevy Truck line in the period immediately following the employees' return to work after the strike, and that this diminished performance increased and then continued virtually unabated up to the time of the discharges. Whether the conduct of the employees on the line satisfied the definition of "strike" under the Act, or whether it can properly be characterized as a continuation of the strike which was previously held by the Board to be illegal, is not at issue in these proceedings; and we would point out as well that even if it had been established that all the employees on the line were engaging in an illegal strike and that the strike was a continuation of the previous one, that would not have permitted the Company to lock out its employees. The Labour Relations Act contains an absolute prohibition against lock-outs during the term of a collective agreement.

32. We have emphasized that the discharges were taken with almost total disregard for the individual situations of the particular individuals involved. The Union contended



that the discharge of such a large number of employees in such blatantly unfair circumstances indicates that there must have been more in the employer's mind than just to return the line to its pre-strike production levels. In response to a question from the Board as to what precisely that might have been, counsel stated, without any significant further elaboration, that the discharges were designed to prevent the discharged employees and the employees remaining in the plant from exercising their rights under the collective agreement, as well as their rights to grieve and their rights to union representation.

33. If the Company was attempting by the discharges of the employees on the Chevy Truck line to bring pressure to bear on either the Union or the employees to accept different terms of employment than those contained in the collective agreement, or to refrain from exercising their rights to grieve or to union representation, then the discharges would amount to a lock-out under the Act. The evidence before us, however, does not support any of these allegations of the Union.

34. There was no evidence before us that the Company was not prepared to live by the terms of its collective agreement with the Union. That agreement provides that the Company has the right, among other things, to determine standards of production and quantity standards in accordance with industrial engineering methods. The evidence establishes that, although the production standard on the Chevy Truck line was set at 2,080, the Company was prepared to accept 1,800 pending a plant-wide production standards review. The evidence also establishes that this level of production was consistently achieved from the middle of the first quarter of 1975 until the time of the strike in late August of 1976 and that the objective of the Company throughout the critical period from September 8 to October 19 was to return production on the Chevy Truck line to the pre-strike levels. Lest there be any misunderstanding on this point, we wish to make it clear that this Board is not making any finding as to whether 2,080 or 1,800 is, in fact, in accordance with industrial engineering methods. Our finding is simply that the evidence before us does not establish that the Company was seeking any change in the terms of the collective agreement.

35. As for counsel's allegation that the discharges were designed to prevent the Company's employees from exercising their rights to grieve and their rights to union representation, again, there is no evidence before us of any attempt on the part of the Company to circumvent the grievance machinery or to bypass the Union. The evidence establishes that the Company held a number of meetings with the Union's shop committee during the August/September strike in an effort to get the employees back to work, and that at those meetings the Company went some distance toward meeting the strikers' demands. After the Board ruled that the strike was illegal, the Company was informed by the Union's shop committee that the employees would require certain assurances and concessions before they would return to work, notwithstanding the Board's order; and these assurances and concessions were given. At that time, the Company also agreed to meet with the Union to discuss outstanding problems, and the Union was requested to provide the Company with an agenda outlining the areas which it wished discussed. When this agenda was not immediately forthcoming, the Company took the initiative and contacted the Union on two separate occasions to obtain an agenda and establish a date for the meeting. On September 16th, a date was set, and the Company was promised that it would receive an agenda within a couple of days. That agenda did not arrive until two hours before the meeting was scheduled to occur and, as well, it raised two items which the Company had not anticipated would be raised. Nevertheless, the Company met with the Union on September 23rd as

scheduled, and that same day issued a detailed response in which certain offers were made to improve the situation.

36. Counsel pointed out that rarely will there be any direct evidence of an unlawful motive on the part of an employer. While that is undoubtedly true, it is also true that this Board must base its findings on the evidence before it and is not free to base its decision on abstract speculation. The evidence before us is that 30 employees were fired (albeit en masse and without regard to seniority, disciplinary history or degree of individual culpability) for their participation, upon pain of discharge, in a significant and prolonged production slow-down which the employer had investigated and determined, rightly or wrongly, to be without acceptable mitigating factors. In the absence of any evidence in the surrounding circumstances from which we might infer that the discharges were taken with a view to compel or induce employees to refrain from exercising rights or privileges under The Labour Relations Act, or to agree to provisions or changes in provisions respecting terms or conditions of employment ..., this Board is compelled to find that the subjective requirement of the definition of "lock-out" has not been established.

37. There is one additional legal argument which was advanced by the Union which is worthy of analysis. Counsel contended that the definition of "lock-out" in section 1(1)(i) of the Act should not be regarded by the Board as a comprehensive definition, and that the language is broad enough, in light of the work "includes", to allow for an expansive interpretation in the appropriate situation. In support of this contention, counsel relied on the Board's decision in *Joyce and Smith Plating Company Limited of Hamilton*, 56 CLLC, ¶18,048 in which the Chairman stated, by way of dictum, that the definition of "lock-out" in the Act comprehended not only the situation expressly provided for in the "definition", but also the meaning which the term had acquired in common acceptance.

38. Our response to this further argument of the Union is that it is based not only on a misconception of the scope of the *Joyce* decision, but also on a misconception of the system of dispute resolution which The Labour Relations Act establishes. At the time of the *Joyce* decision, October 1956, the words "to refrain from exercising any rights or privileges under this Act" were not included in The Labour Relations Act definition of lock-out. These words were added to the Act in April of 1957, presumably to ensure that the kind of conduct which occurred in *Joyce* would be caught by the statutory definition (see, in this regard, The Labour Relations Amendment Act, 1957). In *Joyce*, the employer fired approximately 25 of its employees immediately upon learning of their attendance at a union meeting. Since that decision, the Board has required that the applicant establish that the employer's refusal to employ was done with a view to compel or induce employees to either refrain from exercising rights or privileges under the Act, or to agree to provisions or changes in provisions respecting terms or conditions of employment. In no case has the Board gone beyond the explicit words of the statutory definition and read in some new qualifying purpose.

39. There would appear to be, moreover, compelling reasons for this long-standing approach to the interpretation of the statute. The definition of "lock-out" as it is presently worded would appear to include any situation in which an employer's refusal to employ employees is grounded in an unfair labour practice (although, of course, the burden of proof in a lock-out application is not reversed as it is in the case of a simple unfair labour practice complaint). What other purpose besides the two purposes expressly provided for in section



1(1)(i) could reasonably be found to satisfy an expansive statutory definition? Stripped to its essentials, the position of the Union would appear to be that the conduct of the employer in this case amounted to a lock-out because it did not differentiate between the individual situations of the 30 discharged workers. But that is to argue that this Board can base a finding of illegal lock-out on a breach of the collective agreement. Such an approach to the construction of the statute is not only inconsistent with the statutory policy expressed in section 37 of the Act which provides that all differences between the parties arising from the interpretation, application, administration or alleged violation of the collective agreement are to be settled by arbitration, it is also completely at odds with the Board's approach to the administration of the unfair labour practice provisions of the Act, provisions which we would emphasize are designed to protect the very rights which are contained in the 1957 addition to the definition of "lock-out". The Board does not allow a section 79(a) complaint to succeed upon proof of a violation of the collective agreement. It requires, and requires only, that the employer's action be motivated by anti-union considerations. In fact, most unfair labour practice complaints occur in the early stages of the collective bargaining relationship before a collective agreement is even in effect. That was the factual situation in which the *Joyce* case arose. In short, if we were to hold at this juncture that the refusal on the part of an employer to employ employees amounted to a lock-out, merely because it appeared to the Board to violate the terms of a collective agreement, even if to a substantial degree, that would clearly constitute an unjustified act of legislation on our part.

40. Our conclusion then, from the explicit language of the statutory definition of "lock-out", from the jurisprudence of the Board, and from the general scheme of The Labour Relations Act, is that this additional legal argument of the applicant cannot prevail and that the Union must establish either that the employees were discharged to compel or induce employees to refrain from exercising rights or privileges under the Act, or to compel or induce employees to agree to provisions or changes in provisions respecting terms and conditions of employment. Having failed to establish either of those two purposes, the Board has no alternative but to dismiss the Union's complaint.

41. In conclusion, we wish to emphasize the precise scope of the legal determination we have made in this case. The applicant has asked us to find that the Company's conduct in discharging 30 of 32 employees employed on its Chevy Truck assembly line amounts to a lock-out and is therefore in violation of the statutory prohibition against lock-outs during the term of a collective agreement. Our decision is that, as a matter of law, the conduct of the employer cannot be characterized as a lock-out within the meaning of The Labour Relations Act and that, accordingly, the Union's complaint must be dismissed. That is not to say, however, that the Company was legally entitled to act as it did or that it cannot be made to answer for its conduct in some other legal forum. As indicated above, the real substance of the Union's complaint, in terms of labour relations law, would appear to be that the employees on the Chevy Truck line were fired without just cause; and in this regard, the Board notes the agreement of counsel that a grievance protesting the employees' discharges had been filed pursuant to the terms of the collective agreement which is currently in existence between the parties. Whether or not, or to what extent, the Union's grievance will succeed at arbitration is not for this Board to say. But that is the legal forum in which the rights of the employees must be determined under the system of dispute resolution provided for in The Labour Relations Act.



**DECISION OF BOARD MEMBER P. J. O'KEEFE:**

1. On October 21, 1976, this Board received an application from the applicant trade union for a declaration that the respondent company engaged in an unlawful lockout. The particulars of the applicant union's complaint, in part, are as follows:

- (a) The applicant and the respondent are parties to a collective agreement which agreement was entered into on the 12th day of March, 1976 and which will remain in full force and effect until the 11th day of March, 1977.
- (b) Concurrent with purchase of the respondent company by ITT Canada Limited, and during the life of the previous collective agreement and continuing during the life of the present collective agreement, the respondent has been consistently pressing employees on the Chevy Truck line, Section C of the plant to produce at a rate which was excessively hazardous and dangerous to the health and safety of the said employees. The employees, individually and through their union, have constantly endeavoured to discuss this problem with representatives of the employer in an attempt to establish a production rate which would be reasonable in all the circumstances and which would ensure the protection and preservation of the health and safety of the said employees while at the same time provided that a reasonable production output be attained. All of these efforts have been fruitless and the employer has continued to press its demands and insistence on ever increasing production.
- (c) On October 19, 1976, at approximately 2:30 p.m. the employees on the Chevy Truck line, Section C at the respondent's plant and other employees who had worked on that line in the immediate past were called to a lunch room by Felix Philpott, supervisor.
- (d) At various times during this meeting other unidentified members from the employer's management were in attendance.
- (e) At this time all of the said employees were informed that the respondent was refusing to continue to employ them as employees effective October 19, 1976. All of these employees were given a letter similar in nature to that attached hereto. Contrary to what is alleged in the said letter, the applicant denies that any of its employees were engaging in a slowdown of the nature described in the said letter.
- (f) Later on the same day, at approximately 11:45 p.m., the employees who had been working on the afternoon shift on the Chevy Truck line, Section C at the employer's plant were also informed that the respondent was refusing to continue them in their em-

ployment. They were also given letters similar to the one attached hereto. The applicant similarly denies that the employees had been engaged in any slowdown of the nature therein described.

- (g) On October 20, 1976, an employee who had not been present in the plant the previous day was also informed that the respondent was refusing to continue her in her employment. She had also been working on the Chevy Truck line, Section C of the respondent's plant, had also received a letter similar to the one attached hereto and also denies that she had been engaged in any slowdown of the nature therein described.
- (h) The applicant contends that all discharges were instituted by the respondent in an attempt to compel the employees to agree to changes in provisions respecting the terms of employment, namely to compel increased productivity to a rate which was unsafe and hazardous to the employees in question.
- (i) The applicant contends that, by its actions, the respondent has locked out the employees in question contrary to the provisions of The Labour Relations Act, Section 63.
- (j) The said lockout is continuing and immediate Board assistance is required. The applicant requests that in the interest of the employees concerned and in the interest of the public, an expedited hearing is necessary in this matter and such is therefore requested.

2. The letter mentioned in paragraphs 1(e) and (f) above is as follows:

October 19, 1976

The Ontario Labour Relations Board did, by its September 8, 1976 decision, declare that employees of this company were engaging in an unlawful strike, and directed the named employees "to cease and desist from engaging in an unlawful strike ...". The definition of "strike" as contained in the Ontario Labour Relations Act includes "... a *slowdown* or other concerted activity on the part of employees designed to restrict or limit output".

Since your return to work following the walkout employees on the Chev Truck line, of which you are one, have been engaging in a definite slowdown. Such slowdown is therefore, a continuation of the strike which was prohibited by the Labour Board's decision.

We have, on several occasions since the return to work, met with employees on the Chev Truck line, including yourself, in an effort to determine if there is any reason for the sharp reduction in production and to try to persuade you to end your slowdown. As a result of those meetings we have concluded that there is no other significant reason for the

reduced production except the slowdown of employees, and you have refused to end your slowdown and return to normal production.

We feel we have been most patient and have made every reasonable effort. Your continued refusal to co-operate with our efforts or to comply with the Labour Board's decision leaves us no alternative but to terminate your employment with this company.

Your termination is effective as of this date. Any monies owing and appropriate documents will be mailed to you.

Wilf Evans

3. In support of its claims the applicant called 16 employees to give sworn testimony before the Board.

4. The first witness called by the union was Mr. Rahim Siraj, who testified that he was an employee of the company since February 1974. He is a punch operator. He is the President of the applicant union, having been elected to that position in January 1976. Prior to that time, he had been a shop steward of the union for a period of one year. His evidence disclosed that the company was in the business of manufacturing various automotive parts including panel window frames, bumpers, roof racks, dashboards and other parts. The company had four different departments, employing approximately 25 to 30 people in each department, and worked on two shifts, days and afternoons on a 40-hour week. He started work on the Chevy Truck production line and has worked on the various operations on that production line. He explained that he had seen a sign on the production line that specified a daily production standard of 2,080 pieces. During the periods he worked on the line, the line had produced 1200 to 1600 pieces for an 8-hour period on the afternoon shift. He was told by his foreman what the production was to be. No one had complained about his production and the job generally was satisfactory to him until about January 1976, at which time there was pressure from management to increase production. He said he believed in putting in a fair day's work for a fair day's pay, but balked at extreme pressure by the company to work at a speed that he felt was unreasonable. The union had grieved the company's pressure to speed up and had prepared and circulated a petition to the company requesting a time study on the rate of production on the line. He was informed that the petition was rejected by the company on the grounds that certain of the people who had signed the petition were not workers on the particular line. The employees, as a result of this rejection of the union-initiated petition, lost trust in the union because of the apparent lack of results by the union in this matter. On the date of the mass firing of the employees on the Chevy truck line he was engaged in a downtown Toronto hotel arbitration hearing on behalf of four grieving employees of the company. He heard of the mass firing by a telephone message during the arbitration hearing.

5. During intense cross examination, Mr. Siraj indicated that from April 1975 to the end of 1975, the line was producing 1400 to 1800 pieces and it could be from 1600 to 1800 pieces. From the beginning of 1976 to the date of a strike by the employees in August 1976, the rate of production was from 1600 to 1800 pieces. In August the employees walked out of the plant and this Board subsequently decided that the strike was unlawful. He admitted that the union had failed to submit names to the safety committee as required under the



agreement. The work pressures started after the new management had taken over the plant, the production standards changed from time to time like the weather. He indicated that grievances had been filed on behalf of the employees who were the subject of this application. He admitted that he was not all that familiar with the collective agreement. He stated that there were very bad working conditions at the company and that the company had no respect for the union, and that he felt they were working with no rights. On one occasion he stated that the company gave a three-day suspension to an employee because that employee had participated in a protest while in India. He stated that the company knew they had no rights and had told him so and had also told him that if he did not want to work to its requirements, to go back to his country of origin. He said that sometimes workers "kill" themselves and when, as a result, they claim awards from the Workmen's Compensation Board, the company frustrates their efforts by not completing the workmen's compensation forms. Where previously two employees would lift an object in the plant, now the company required one man to lift the object. As President of the union, the workers brought their complaints to him and despite his efforts to get relief for them, he was not successful with the company. In closing his testimony, he plaintively cried out "God, save us from Milrod". He said the pressure to increase production by increased standards would kill them and if they were fired it was very hard for him to get any other kind of job.

6. Miss Ena Smith testified that she had been employed by the company for two years and seven months. She had welded and was classified as a punch press operator. In May of 1976, there was a walkout by the employees over the fact that four fellow employees had been fired. She had supported the four employees. The plant superintendent, Wilf Evans, asked her to return to her machine and she had refused because she stated she was a member of the union and had to support her fellow workers. The following Friday she was told that she was being transferred to the Chevy truck line. She had been elected shop steward two days before her dismissal. She outlined an incident in which her supervisor came to her with respect to imposing a discipline. She had requested to have a shop steward present during the discussion on her discipline and her supervisor pointed out to her that now that she had been elected a shop steward herself, she could now take pressure. She testified that she had never participated in a slowdown. She testified that she had attended a meeting in the cafeteria and that Mr. Wilfred Evans, the superintendent, had indicated that he wanted a production standard of 1800 pieces. The workers at the time told him that they had problems reaching that production level. Evans indicated that he did not care about their problems; he just wanted 1800 pieces. Evans told those at the meeting that they were all immigrants here and had to work hard. They had complained about these remarks to the General Manager, Mr. Argue, and had been told by Argue to complain to the Human Rights Commission. She claimed that she was terminated by the company because of the active part she took in the union. Prior to her activity with the union, she had no problems with the company. She had talked too much about her rights and she believed that the company decided that the best way to get rid of her was to put her on the Chevy truck line. That line was a hard line to work. She had requested a transfer from the line and had been refused. She said that she heard her supervisor, Mr. Wilfred Evans, say that he wanted to get rid of the black people. Under cross examination, Miss Smith said that half the number of employees at the plant were black and she reiterated that she had heard Evans say that he wanted to get rid of black people. She had not made a complaint to the Human Rights Commission.

7. Mrs. Norma Mitchell testified that she had been employed by the company for two years and eight months. She was a spot welder and punch press operator. She was suspended for three days in January 1976 and had grieved the suspension and the grievance had gone to arbitration. She testified as to the pressures on the job and complaints against her that she was spending too much time in the washroom. She had not engaged in a slow-down. She said that Mr. Evans had called a meeting of the employees and that he told them he wanted a production of 1800 pieces, and the workers said that that level of production was unsafe. She said she was to attend an arbitration case respecting the matter of a grievance with respect to four dismissed employees of the company. Before the arbitration hearing, she was approached by Mr. Evans, her supervisor, who advised her that if she was going to be a witness at the arbitration hearing, there was going to be a problem. The next day she attended the arbitration and it was at that hearing that she had heard of the mass dismissals by the company. She also was dismissed at that time. During cross examination she admitted to receiving suspensions and warning letters from time to time.

8. The applicant called as witnesses a group of workers from the plant including Dorothy Bowen, Leslie Dunkley, Winston Mauricette, Maisie Hunter, Edward Williamson, Martel Campbell, Mulli Fraser, Clarence Ivey, Cecil Anderson, George Finley, Rhena Morris and Edna Chambers. In the main, the evidence of these witnesses supported the evidence of Rahim Siraj, Ena Smith and Norma Mitchell.

9. From the evidence of this parade of witnesses, the Board was told that the pre-strike rate of production was achieved by having a lead hand and another supervisor assist on the line from time to time, particularly relieving on the line when employees from the line left to go to the washroom. The general trend of the evidence was that there was continual pressure on the employees to increase production. They felt that the pressure to increase production was unsafe and they testified to the effect that as a result of the increased pressure, there were now a greater incidence of accidents, particularly cuts. The evidence disclosed that they felt that the production standard required from the employees after the strike could not be achieved because management had removed from the line the previous assistance given to the line by the lead hand and supervisory relief and, further, because the personnel had been shuffled to the extent that there were now more inexperienced personnel on that line. It was repeated time after time that the plant superintendent, Wilf Evans, had made racist and derogatory remarks to the plant workers including such remarks as "You are all immigrants here and have to work hard and you have no rights here", and "I will soon get rid of all you black niggers out of here". Several workers denied the claim by Mr. Argue that there were banks of spare parts available after the strike. Most of the witnesses testified that they were not participating in a slowdown of work after the strike and denied that they were told by anyone to slow down or had acted in concert to stage a slowdown of work. A common complaint was that they were required to work like slaves.

10. Most of the evidence of Mr. Argue, the General Manager of the company, is outlined in the majority decision. To expand on that evidence, it is further enlightening to make note of the following additional testimony from him. Mr. Argue received his professional engineering degree while attending the Royal Military College at Kingston. After obtaining his degree, he received a commission in the Royal Canadian Mechanical Engineers. He undertook a particular specialist course of study dealing with electrical management, time study, job evaluation and job analysis. On graduation, he became an instructor to senior non-commissioned officers at the Royal Military College. He left the army in 1964 and his



first job in industry, after leaving the army, was with the Inglis company at their Stoney Creek plant. Having spent a relatively short period of time with that company, he joined the respondent company in October 1974. He freely admitted that he had signed a petition being circulated by the employees petitioning for a time study on the production line. He had signed it with the nom de plume, "007".

11. Throughout the hearing via the evidence of the various witnesses called by the applicant union, we heard of various meetings and the on-the-job relationships between Mr. McDonald, the company's production and control manager, Mr. Wilf Evans, the plant superintendent, and the employees. It appeared to me from the evidence that these two management personnel were the equivalent of non-commissioned officers in the military context, and they were, at most, little more than conduits between the workers and Mr. Argue, the company's general manager or ranking commissioned officer.

12. Mr. McDonald, production and control manager, called by counsel for the respondent company to give evidence in this matter, said that he had attended the earlier hearings of the Board into the instant matter and that, on his own initiative, he undertook his own investigative inquiry into the inventory of parts. In his opinion, his findings would reflect on the accuracy of the production records as submitted at the hearing by Mr. Argue. The result of his private investigation into this matter supported the evidence of Mr. Argue and reflected adversely on the evidence of various witnesses for the applicant union with respect to the rate of production prior to and after the strike and before the dismissal of the employees. Under cross examination he revealed he undertook this particular study to check out the accuracy of the production records submitted in evidence by Mr. Argue. He stated that no one had requested or told him to make this study. He did not have at the hearing any records to support his findings, and he admitted that he was mindful of the possibility that he might be called as a witness at this hearing with respect to inventory records. Other details of his evidence are outlined in the decision of the majority.

13. The second non-commissioned officer and conduit to Mr. Argue who, throughout the testimony of the various union witnesses was a leading character in this affair, Mr. Wilf Evans, the plant superintendent, was not called as a witness by counsel for the respondent company. While this Board might have had much enlightenment into the instant matter if given the opportunity of hearing the evidence of this central character, nevertheless, the law game that we have become accustomed to is an art of legal technicalities and ballet-like, legal, artistic footwork, rather than openness and "friend of the court" enlightenment. Despite the legal tactical position in matters of this kind, we must note the failure of the respondent to call this particular principal character, Wilf Evans. Witness after witness called by the applicant testified that Mr. Wilf Evans, the plant superintendent was a work pusher, a driver and left something to be desired in the diplomatic area of employee relations. He was painted by the worker witnesses as a crude, ugly, managerial-type person who had no regard for workers' rights.

14. With respect to the foregoing failure of the respondent company to call Mr. Wilf Evans, I am influenced by the following extract from *The Law of Evidence in Civil Cases*, Sopinka and Lederman, Butterworths 1974, at p.535 et seq.:



## EFFECT OF FAILURE TO CALL WITNESS OR PARTY

In *Blatch v. Archer* Lord Mansfield stated:

“It is certainly a maxim that all evidence is to be weighted according to the proof which it was in the power of the other to have contradicted.”

The application of this maxim has led to a well-recognized rule that the failure of a party or witness to give and by which the facts might have been elucidated, justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed.

15. What we find from the foregoing recital of the evidence in the instant case is a very sharp conflict in the evidence between the large number of witnesses called by the union with that of the witness, Mr. Argue, the General Manager of the respondent company.

16. The evidence of Mr. McDonald, production and control manager can, in the circumstances, be given very little weight. His evidence in supporting that of Mr. Argue on the important issue of the rate of production was researched after he had sat in on the Board hearing and heard the evidence given by Mr. Argue. His kind of self-serving evidence can be given little credence.

17. The scenario, from the evidence in this matter, is that of a general manager who brings to the workplace a particular view of employer-employee relations that would be more in keeping with the relationship of the military establishment. The objective or target was clear, and it was simply that production had to be increased no matter what the obstacles, including the collective agreement. The rights of the workers under that collective agreement, including the right to work in a safe manner, were bypassed. A collective agreement removes the old type of master-servant relationship where, in times past, whips were permissible to increase production. Now, with technology, we have adopted job evaluation, engineering time-study methods and such related technical studies to bring to the workplace efficiency and manageable workloads. It is regrettable, when such high-sounding, modern management techniques are placed in the wrong hands (as in the instant case), it becomes nothing more than fancy packaging for the old-time whip.

18. The green light to go ahead with the mass firing of these 30 employees was given by the ITT corporate decision-makers in Detroit and New York. One can only speculate as to the good corporate citizenship of that international conglomerate in this matter.

19. The raw result of that decision which resulted in the mass firing of 30 workers in Ontario is the equivalent of the impact of an old-time public lynching. It is indeed a sharp lesson for all the other employees in the plant and an example to all of the massive power of the multi-national corporate giant ITT in our society. A further sociological impact of the dismissal from employment of relatively unskilled plant workers in the month of October, during a period of excessive unemployment, with a union-activist, illegal striker tag, is the handicap that would be hard for any worker to overcome in finding a new job; but when you add to that handicap the fact that all of these employees were immigrants from a very visible minority culture, then it is an almost sure-fire guarantee that dismissal for them constitutes an act of industrial relations capital punishment.

20. In assessing Mr. Argue's evidence and behaviour in this matter, two things in particular are, in my mind, very significant. First, his apparent infantile, callous signing of the employees' petition requesting a time-study of their jobs. By signing the petition with the nom de plume, "007", a reference to a Hollywood international strong-arm guardian of western marketplace morality, he discloses an unbelievable lack of sensitivity to the employees' concerns. The petition procedure in industrial relations, particularly in the industrial relations set-up at this plant, may indeed be a not very sophisticated or militant procedure in securing workers' rights. However that might be, at least in the minds of the workers themselves it appeared to be a medium through which they could air and redress certain of their very real concerns and, hopefully, bring about a study into their complaint that the required standard of production was excessive, unsafe and unjust. Having signed the petition with the "007" inanity, and then rejecting the same petition on the technical ground that it was signed by persons other than the employees directly involved, demonstrates Mr. Argue's utter contempt for the workers themselves and the characteristic peaceful form of representation inherent in any petition. The workers, having received this apparent contemptuous slap in the face to an invitation by them to sit down and reason, and frustrated in the peaceful pursuit of even discussing their complaints, under the circumstances of this case, is it any wonder that the employees resorted to an illegal strike to protest their inability to have their complaints redressed in a peaceful, orderly manner?

21. On the serious complaint of the workers that their plant superintendent had made crude, racial remarks, Mr. Argue's response was to advise them to take the matter up with the Human Rights Commission of Ontario. He apparently did not feel that it was his responsibility to root out, or discipline, or indeed make his own enquiries into the allegation that the company was harbouring, in a managerial position, an alleged racist of the lowest kind. This attitude on his part not only demonstrates a lack of enlightened managerial responsibility in the industrial relations scene, but also a lack of citizenship responsibility in our society to step in where the citizen can do so to correct, where possible, the root evil of race discrimination.

22. The respondent employer is bound by a collective agreement which requires that it discharges employees only for a just cause; nevertheless, it is admitted that the decision to carry out a "mass discharge" was taken without regard to these contractual obligations and without regard to the individual work records, seniority, character, or culpability of the individual employees involved. The applicant submits that this arbitrary conduct of the employer constitutes a "lockout" within the meaning of section 1(1)(i) of The Labour Relations Act.

23. In order for there to be a "lockout" within the meaning of the Act, there must be, *inter alia*, a "refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees ... to refrain from exercising any rights or privileges under this Act ...". There is no doubt that in this case, there has been a conscious, calculated and intentional discharge of a large number of employees. It is equally clear, in my submission, that this mass discharge has the practical effect of undermining rights to which the employees are entitled by virtue of the terms of their collective agreement.

24. Most collective agreements provide that an employee may only be discharged for just and proper cause. Apart from the agreement, section 37(8) of The Labour Relations Act permits an arbitrator to substitute for the discharge such penalty as he considers just



and reasonable in all the circumstances. In theory, therefore, the agreement and the Act assure each employee an objective appraisal of his conduct by a neutral adjudicator so that a measure of "justice" can be achieved in the employment relationship. The reality, however, is somewhat different. Arbitration boards are *ad hoc* tribunals constituted to hear a particular grievance. As a result, it takes months before a matter can be resolved by arbitration and it is not unusual for the cost to be in excess of \$1,000 per day. The process has become so rigid and legalistic that it is becoming increasingly necessary to retain counsel. On at least two occasions the legislature has had to amend the Act in order to reverse court decisions which were unduly restrictive. By refusing to name his nominee, or agree to a chairman, a recalcitrant party can force a reference to the Minister and thereby accomplish an additional few months delay. Meanwhile, the aggrieved employee is forced to seek work elsewhere regardless of the merits of his case. In the result, an employer can rid himself of an employee, notwithstanding his obligations under the agreement.

25. In this case, we have 30 discharges. Because of the defects in the current arbitration process and regardless of the employer's motive, the employees here face a possible 30 separate arbitration cases, months, if not years of delay, and thousands of dollars in costs if they are to seek redress through the grievance procedure. The employer, of course, is not responsible for the inadequacies of the grievance-arbitration process. He is perfectly entitled to use the opportunities which that system provides in order to promote his own interests. Nevertheless, the reality of which we are all aware is that the system cannot cope with a mass discharge and that whatever the merits of the employees' case, if they are not successful in this forum, they will have no practical remedy elsewhere. It is this reality which explains, at least in part, the disaffection among the employees which was evident in their testimony at the hearing. Some months ago, these employees, in breach of the Act and their collective agreement, engaged in an unlawful strike. Within a few days, their employer was able to secure a remedy from this Board in the nature of a mandatory injunction enforceable in the Supreme Court of Ontario. Now, in respect of their mass discharge, the employees seeking redress face months of delay and exorbitant costs.

26. The discharges were not disputed nor, in my submission, can it be disputed that a "mass discharge" makes it very difficult as a practical matter for individual employees to secure redress through the present cumbersome grievance-arbitration system. The issue before us is whether the employer's action took the form of a mass discharge in order to "overload the system" and thereby frustrate the employees' right to grieve by creating insuperable procedural and financial obstacles. In other words, did the employer, knowing the defects in the present arbitration system, carry out a mass discharge in order that he would be immune from arbitral review which, in practical terms, is not available if there is a mass violation of the agreement. If this was the employer's objective, then his conduct constitutes a lockout within the meaning of section 1(1)(i) of the Act. I am prepared to accept that the company's objective was to greatly increase the production on the Chevy Truck line. That surely is not the point. The issue is whether, in order to accomplish that objective, the employer sought to discharge a number of his employees in such a way that as a practical matter, his decision could not be reviewed by an arbitrator. As I have already indicated, that is the practical result of the course of conduct which the employer adopted. The question remains, did the employer intend this result or is it merely an incidental effect (or unintended benefit)?



27. The majority have pointed out that in making our assessment of the employer's conduct, we are not permitted to speculate. In unfair labour practice cases, there is seldom direct evidence of the employer's motivation. In complaints of an unlawful discharge under section 79, for example, an employer will usually tender a reason for the discharge entirely free of any anti-union animus, and it remains for the Board to determine whether this reason is, in fact, the real reason for discharge. As was said in the *National Automatic Vending* case, 63 CLLC ¶16,278:

In complaints under section 65 there is often, of course, conflicting testimony between the employer's statements that he has fired the employee for incompetence or some other non-discriminatory reason and the employee's allegations, based usually on circumstantial evidence, that his dismissal was for the ulterior purpose of defeating the union. In weighing the evidence as to these conflicting claims, the Board must consider all the circumstances, including the credibility of the witnesses, the nature of the reasons given, if any, at the time for the employer's action and the basis therefor, the employment history of the employee affected, the existence of contemporaneous union activity, the participation by this employee and other employees in such activities, any overt acts of the employer which may have been in response to such activities, the timing and manner of the discharge, the likelihood or probability of the employer's action for the reasons given, and the fact that the true reasons for the discharge often lie exclusively within the knowledge or means of knowledge of the employer.

Likewise, when the Board is dealing with an allegation of an unlawful lockout, one must examine all the circumstances in order to determine the real motive behind the employer's conduct (see *Harry Woods Transport Limited* case, [1976] OLRB Rep. July, p.341). In appraising these circumstances, the Board must apply its special knowledge of industrial relations reality. A pattern of conduct, apparently innocent, may take on real significance in an industrial relations context. This Board, rather than a court, has been given the responsibility to interpret and apply the Act because it is expected to be more sensitive to these matters.

28. It is insufficient to ask whether the employer's conduct is consistent with its stated objective of increasing production. The real issue is whether in furtherance of that objective, it has engaged in an unlawful lockout. To put the matter as it appears in this case, in order to get rid of the problem once and for all, the employer discharged the innocent and the guilty in order that the latter would have no access to arbitration. What then are the facts in this case? The employer is a subsidiary of ITT – a large and sophisticated employer. In response to the unlawful strike, the discipline imposed indicates that great care was taken that those who were not responsible were not penalized. The company made a number of efforts to resolve certain long-standing problems within the plant and in this regard, it entertained the complaints of the employees and had a number of meetings with the employees and their union. It will be observed that throughout this process, the company has been fully advised of its legal rights (see, for example, letter on page 5) and, in my view, it is evident that the company was aware of its obligations under the collective agreement. Mr. Argue gave evidence that the decision was taken with great care and in consultation with officials at the American parent company. Nevertheless, the decision to discharge the entire assembly line was arbitrary, precipitate, and taken without regard for the work records or individual cul-

pability of the particular employees. It was clear that a number of the employees could not be considered responsible for the slow-down on the Chevy truck line. One person had been transferred to the line only two weeks before, but he too was fired. Thus, we have a pattern of reasonable conduct, following on the illegal strike, broken by an incident which appeared arbitrary, immoderate, unreasonable apparently without regard to contractual obligation and entirely inconsistent with the immediately preceding pattern of conduct. There are two possible explanations for this. One can argue that the serious production problems occasioned by the employees' alleged slowdown eventually generated such frustration that the employer was prepared to undertake a mass discharge without regard to the individual circumstances of the particular employees and without regard for the rights of those employees and the obligations of the employer under the collective agreement. It is an unusual event for an employer to discharge a large group of employees particularly where, as here he would have to recruit enough new employees to staff the entire Chevy truck line. In addition, most employers find it personally difficult to discharge people. Is there evidence of a kind of frustration which might explain this precipitated action? On the contrary, the evidence establishes that the employer moved in this matter rationally and with extreme deliberation to its decision. However arbitrary or unjust the decision may appear, it is clearly the result of a rational and calculated decision-making process. How can one explain the conduct of a reasonable and relatively liberal attachment if that conduct appears to be both arbitrary and in flagrant disregard of obligations under the collective agreement? In my submission, it is only explainable if one considers the employer's business objective which, as we have seen, is to raise production. In order to accomplish that objective, the employer must get rid of those employees who are challenging the methods adopted to reach that goal. If these few key persons are singled out and discharged, however, they will be able to file grievances and there is a possibility that an arbitrator might set aside the discharge. Even if an arbitrator modified the penalty to a substantial suspension, the "trouble makers" would eventually return to the plant. A safer course of action would be to discharge many more employees than is necessary for that would so overburden the arbitration process that, for practical purposes, the "trouble makers" would be out of the plant entirely and there would be no possibility of reinstatement. Viewed in this way, the conduct of the employer is not arbitrary at all, nor is it inconsistent that he would discharge someone who was transferred to the line only two weeks before. Employers do not normally undertake mass discharges; they do not normally discharge employees without regard to seniority; they do not normally discharge the innocent along with the guilty; but they might do all these things if they thought that it would solve their production problems once and for all.

29. In the circumstances of this case involving the production problems, "once and for all" meant getting rid of the "trouble makers" in such a way that there is no possibility that they would be returned to the plant. The way to ensure this result was to fire a sufficient number of employees so that the grievance process would not work. That tactic, no matter how skilfully executed or orchestrated by sophisticated legal experts, is quite clearly an unlawful lockout.

30. Throughout the hearing in this matter, we heard cries from the workers for "justice". We could only ignore that cry to our peril as an administrative tribunal responsible for the administration of The Labour Relations Act of Ontario. Guiding me in my decision in this matter is my awareness of my responsibility as stated in section 10 of The Interpretation Act, R.S.O. 1970, c.225 as follows:



Every Act shall be deemed to be remedial whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

I am further influenced in this decision by the comments of Mr. Justice Hall, speaking for the Supreme Court of Canada in the *White Lunch Ltd. et al* case, (1966) 56 D.L.R. (2d) 193, 66 CLLC ¶14,110 (S.C.C.), as follows:

Whatever merit the arguments of the respondent had at the beginning of labour relations legislation, it seems to me that in the stage of industrial development now existing it must be accepted that legislation to achieve industrial peace and to provide a forum for the quick determination of labour-management disputes is legislation in the public interest, beneficial to employees or employer and not something to be whittled to a minimum or narrow interpretation in the face of the expressed will of legislatures, which, in enacting such legislation, were aware that common law rights were being altered because of industrial development and mass employment which rendered illusory the so-called right of the individual to bargain individually with the corporate employer of the mid-twentieth century.

We must demonstrate in this case that our democratic legislative processes have provided in The Labour Relations Act means whereby workers can receive justice with respect to their lawful claims. The provision of law-dispensing establishments is a far cry from a justice-dispensing establishment. If justice-dispensing establishments are not available to the citizen, and all he has, despite the obvious intent of the legislature, is a technicality-bound sports arena for adversarial, legal athletes, then the citizen will find another outlet to redress his grievance and that outlet, unfortunately in most instances, can lead only to disorder.

31. The facts in this case dictate that this Board gives justice as provided in The Labour Relations Act to the 30 employees locked out unlawfully by the respondent employer.

32. I would order immediate reinstatement without loss of pay or other entitlement to all the employees unlawfully locked out by the respondent company.

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**1662-75-R** The Mount Nemo Truckers Association, (Applicant); **Nelson Crushed Stone**; a division of King Paving and Materials, a division of The Flintkote Company of Canada Limited, (Respondent), United Cement, Lime and Gyproc Workers' International Union, AFL, CIO, CLC, Local Union #494, (Intervener).

**Certification – Trade Union Status – Employee – Whether group of truck drivers “dependent contractors” – Whether trade union an organization of employees.**

**BEFORE:** D.H. Kates, Vice-Chairman and Board Members P.J. O’Keeffe and J.E.C. Robinson, Q.C.

**APPEARANCES:** *P. Kirby, Carmine Iafrate, Don Nickel, Karl Sommer, and Giuseppe Amello for the applicant; J.P. Sanderson, B.R. Baldwin and E. Drury for the respondent; Eric Batten for the intervener.*

**DECISION OF D.H. KATES AND P.J. O’KEEFFE:** February 22, 1977

1. This is an application for certification for a group of truckers engaged by the respondent at its quarry in Burlington, Ontario.
2. At the initial hearing scheduled in this matter the Board entertained the evidence and representations of the parties with respect to the applicant’s status as a trade union under section 1(1) (n) of the Act. At that time it was determined that the applicant’s status to represent the persons for whom certification was sought was interrelated with, and dependent upon, whether such persons fell within the definition of “dependent contractor.” There are approximately forty truckers affected by the applicant’s efforts to acquire bargaining rights on their behalf. The respondent at all times asserted that these truckers in the traditional sense are independent businessmen who are disentitled to the benefits of representative rights. The respondent and the intervener are parties to a collective agreement whose scope encompasses “an all employee unit.” The intervener has intervened in these proceedings solely for the purpose of safeguarding its representative rights. The intervener has taken no position on the main issue before the Board nor has it suggested that the truckers under consideration are “employees” as opposed to “dependent contractors.” The applicant asserts that the persons affected by the application are indeed “dependent contractors” and ought to be treated as “employees” entitled to representation by it in a separate and distinct bargaining unit.
3. The relevant provisions of the Act under review read as follows:
 

“1. – (1) In this Act,

(ga) “dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that

person more closely resembling the relationship of an employee than that of an independent contractor;

(gb)"employee" includes a dependent contractor;

6. – (4) A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit."

4. The Labour Relations Officer assigned the task of inquiring into the list and composition of the bargaining unit examined each of the truckers' duties and responsibilities in context with his particular relationship with the respondent. In examining the six volumes of information contained in his Report the parties in a general sense indicated that there was little distinction between the status of one trucker and the other. It was pointed out that two of the truckers had formed a partnership arrangement but had nonetheless operated one of the two trucks comprising the assets of the partnership in the service of the respondent. In short, the Board proposes to adopt an "all or nothing" approach with respect to our treatment of the truckers' eligibility to the status of "dependent contractor." (See: *The Globe and Mail* case, 63 CLLC, # 16,290, at page 1205, *The Municipality of Metropolitan Toronto* case, [1961] OLRB Rep. Dec. 322.)

5. The respondent is engaged in the business of processing and distributing crushed stone, asphalt and like materials to construction industry projects in the Burlington area. For this purpose it owns and operates a quarry and a plant for preparing its product. Employees are engaged by the respondent in this specific phase of its operation. The task of delivering the finished product to its customers is assumed by individual truckers hired by the respondent as the need dictates. The market pattern of the respondent's business is not unlike most undertakings involved in the construction industry or on its periphery. In the summer, demand for its product reaches its apex while in the winter demand is at its lowest ebb. For example, the truckers are divided into "A" and "B" groupings with a view to a disciplined organizational means for receiving loads for delivery. In the summer months on alternative days one group lines up at the commencement of the day for receiving of a load; in the winter months groups are extended line-up privileges on alternative weeks. On the particular week a group is not scheduled for work alternative employment is secured with the respondent's co-operation with the Town of Burlington where their services may be retained for snow removal.

6. The truckers, upon being hired, are presented with a contractual agreement which they are expected to sign. The document is prepared by the respondent without negotiation or consultation with the individual trucker. A large number of the truckers reviewed are shown to have provided service to the respondent on a relatively long term basis. Nevertheless no distinction is made with respect to the contents of the arrangement premised upon the trucker's length of service with the respondent. Payment for services is made on a ton-mileage basis and rates are uniformly established in accordance with the geographic distance travelled with respect to a particular job. Premiums are set by the respondent in accordance with the nature of the load and in connection with distance not included in the



schedules. Payments for stand-by time or delays in serving customers and for incidental services discharged at the respondent's yard are also determined on an ad hoc basis by the respondent. In the former instance co-operation with the customer is often required and in the latter case the respondent ordinarily establishes an hourly rate. There was some indication that individual truckers may at times have some input in determining long distance rates. In the event that the respondent gives a customer a discount in the sale of its product the loss is passed on to the trucker who is obliged to deliver the load below the pre-established rates. The trucker is neither informed in advance of this reduced rate nor is he extended the opportunity of negotiating the amount of the reduction.

7. In terms of regular benefits normally conferred upon employees, the trucker is not extended (nor indeed is he necessarily eligible for) unemployment insurance, workmen's compensation, Canada Pension, vacation pay, statutory holidays and the like. He is responsible for payment of income taxes, the arrangement for his hospitalization and the assumption of other like benefits. Each maintains some form of bookkeeping system either discharged by the trucker's spouse or a paid accountant.

8. The trucker owns and operates the truck that is necessary in the discharge of the delivery service extended the respondent. He is confined in his purchase to either the tandem or single axle truck. He is precluded from the purchase of the larger tri-axle vehicle. The market value of a truck may be as high as \$40,000.00. He is required under the provisions of the contract to carry a minimum of \$300,000.00 liability insurance. Although the evidence does not indicate that the respondent co-signs as guarantor with the trucker's creditor in the purchase of the vehicle, nonetheless the trucker from time to time is required to obtain a letter from the respondent pertaining to the nature and stability of his relationship with the respondent. He is responsible for the purchase of all vehicular licences and the necessary P.C.V. licences. Appropriate maintenance costs and general up-keep of the truck are borne by the individual. These costs, of course, are partially off-set by capital depreciation and other expenditures incurred in the operation of the truck may be claimed as allowable tax deductions from gross revenue. In regard to the application that is made to the Ontario Highway Transport Board for his P.C.V. licence the trucker is now eligible for the "R" licence which permits the haulage of crushed stone aggregate over two adjacent regions. Prior to the amended regulations, the Labour Relation Officer's Report indicates, as late as 1966 "PCV licences" were obtained with the aid of, and often, in the respondent's name. Gasoline may be purchased on the respondent's premises at the convenience of the trucker. The respondent requires that the trucker purchase a tarpaulin to cover his load in keeping with the requirements of government regulation. A trucker has often been denied a load or has otherwise been penalized, for failure to provide a tarpaulin. The respondent's name does not appear on the truck nor is there any particular indication, save for a number affixed to the side of his truck, that would identify the truck with the respondent's operation. In this respect the trucker has applied his vehicle for numerous purposes aside from hauling crushed stone for the respondent.

9. Passing reference has already been made to the operation of the delivery system devised by the respondent in consultation with the truckers. Drivers are expected to line up their vehicles for loads at 7.00 a.m. or earlier as prescribed from time to time by the respondent. There was some indication that a trucker may elect to show up for work as he pleases and determine the size of the particular load he carries. It is clear that the dispatcher assigns work loads on a first-come-first-serve basis to truckers constituting the particular group



scheduled to work. The economic reality of the incentive to make ends meet, however, dictates the driver's alacrity to commence work and assume loads. In this regard there are some loads, particularly with respect to destinations in Toronto, that are viewed by the trucker as unprofitable. Collection of monies on C.O.D. orders is the responsibility of the trucker. If difficulties are encountered with the customer the driver is obviously expected to treat the situation with some tact. He is expected to make his delivery at a reasonable speed. It was acknowledged by a driver that he also benefits, in the financial sense, by the speedy dispatch of a load. In this regard a number of the drivers indicated that some prejudicial act in the form of a penalty or discipline would follow in the event that a load was refused or if a load was not delivered within the anticipated time. Once the dispatcher has authorized the trucker to assume a load and he has left the respondent's yard the trucker chooses the particular route necessary to reach his destination. Most drivers personally attend to the delivery service with the truck he owns. In the event a trucker is on vacation, is under suspension for whatever cause, or otherwise incapacitated from discharging this service, he may, in consultation with the respondent hire a driver to replace him.

10. The evidence contained in the Labour Relations Officer's Report clearly establishes that the trucker's principal source of revenue is through the delivery opportunities made available by the respondent. In terms of opportunities for supplementing his income the driver is also, to a meaningful degree, dependent upon the respondent. For example, a driver may be advised of an opportunity to haul a load for a related or sister company of the "Flintkote Conglomerate" of which the respondent is a member. The Board has heretofore related that opportunities to engage in snow removal for the Town of Burlington during the winter period is with the approval of, and in co-operation with, the respondent's officials. The truckers indicated that they may also haul fill for friends and acquaintances who retain their services. In this respect a trucker may purchase a load from the respondent and make a profit on a delivery to the customer. Cartage and horticultural services may also be provided by the trucker from time to time on an intermittent basis. Nevertheless the clear and uncontradicted conclusion to be derived from the evidence is that a driver, with respect to total fiscal revenues is shown to earn the lion's share of his income from the haulage services required by the respondent. The other avenues made available to the driver in terms of supplementing his income account minimally in the computation of gross income. Indeed, many of the drivers indicated that they were expected to give the respondent priority in its delivery service. A driver was expected to report the reason for his failure to attend the respondent's premises when work was made available.

11. The Parties' submissions with respect to the breadth and scope of the Legislature's purpose in introducing the "dependent contractor" concept into the Act assumed extreme importance in making conclusions with respect to the Labour Relations Officer's Report. The respondent's argument with respect to the Legislature's intention was premised upon the *status quo* position assumed by the Board in distinguishing an employee from an independent contractor. (See: *The Livingston Transportation Limited* case, [1972] OLRB Rep. May 1972, p.488, and as applied in a like factual situation described herein in *The General Concrete of Canada Ltd.* case, [1975] OLRB Rep. March 234.) Counsel suggested that the Legislature in recognizing the inadequacies of the existing approaches in dealing with the employee-entrepreneur distinction sought to codify, and thereby limit, the pronouncements of the Board in our most recent decisions. It therefore followed that even assuming the Board's position with respect to employment status of a person for purposes of the Act was sound, the uncertainty created by these decisions was removed by virtue of the

introduction of the amendment. In applying the Board's analysis of the distinctions made in differentiating the employee from the independent contractor, as presently recognized by the Legislature, it was the respondent's general contention that the forty truckers under review continued to fall on the entrepreneurial side of the Board's pre-existing line of demarcation. The applicant dismissed the respondent's submission as overly circumscribed. He argued that the legislature's intention was clearly expansionary with the objective of extending bargaining rights to persons who would otherwise be deprived of the rights of trade union representation. More particularly, reference was made to section 1(gb) in that the conception of "employee" was intended to "include" a "dependent contractor" as defined in section 1(ga) of the Act. (See: *R.v. International Brotherhood of Electrical Workers Union, Local No.1818*, 73 CLLC, #14,163.)

12. The Board has considered the numerous publications and decisions in other jurisdictions concerning the Legislature's purpose for the amendments and the particular needs that were intended to be fulfilled. (See particularly *Arthurs, H.*, "*The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*," (1965) 16 Univ. of Toronto Law Journal 89, with respect to the source of the term "dependent contractor" and the acknowledged justification for its creation.) Moreover, the Labour Relations Board (BC) has engaged in an exhaustive review and analysis of the Jurisprudential authorities inclusive of *The Livingston Transportation* case (*supra*) in explaining the social, economic and political objectives in introducing into the *B.C. Labour Code*, in language subsequently borrowed by the Ontario Legislature, the concept of the artificial person described as the "dependent contractor." (See: *The Fownes Construction Co. Ltd.* case, (1974) Can. Labour Relations Board, Rep. 453, at pp. 455 to 459.) In the Board's view it is more than apparent that the superimposition of this new species on the collective bargaining spectrum was intended to deal with the shortcomings of the common law and judicial restrictions placed upon its elasticity in reaching individuals requiring the assistance of collective bargaining. (See, for example, *N.L.R.B. v. Hearst Publications* (1944) 8 L.C. 179 in context of *The Metropolitan Life Insurance Co., et al* case, 70 CLLC, #14,088, at p. 37.) Suffice it to say for our purposes that the Legislature intended by the amendment to address itself to the mischief created by persons who may very well outwardly manifest the trappings of independent entrepreneurs but who in an intrinsic sense are clearly in such a subservient economic position vis-a-vis the beneficiary of his services that he ought to be extended the protection intended by the collective bargaining process. In this context the Legislature recognized the economic vulnerability of depriving the "so called" small businessman of rights under the Act and thereby exposing him to the arbitrary whims of the person upon whom he is dependent for his livelihood. Not only is this individual denied benefits commonly accepted in our enlightened society as industrial relations norms (e.g., unemployment insurance, workmen's compensation, statutory holidays, vacation pay, minimum wage and maximum hours, etc.) but is also by operation of *The Combines Investigation Act* susceptible to civil and penal sanctions should he, along with his colleagues, seek by concerted action to redress perceived wrongs in his relationship with his ostensible employer. The watch word of the definition is "dependent" and dependent is to be interpreted in a manner consistent with the economic reality of the relationship with the beneficiary of the service having regard to the industry or undertaking under review. It therefore follows that the status of the "dependent contractor" must be matched and plotted in relation to the terms and conditions of "employees" in like industries to determine whether he, in a *de facto* sense, more resembles them. And, alternatively, it may very well be that, notwithstanding shortcomings in his development as a businessman, he may be without the need or the assistance of collective security. We perceive



that the Legislature has instructed the Board in the conduct of such analysis to sacrifice form for substance, to dispel superficial distortion that disguises industrial reality and to supplant individual want by supporting, in appropriate circumstances, collective equality. In short, the Board must deal with the new problem of defining the parameters not only between the employee and entrepreneur but also mid-way between that spectrum of distinguishing and isolating the “dependent contractor” who has statutorily been extended separate and distinct treatment.

13. To an extent the Board accepts the respondent’s analysis with respect to the Legislature’s attempt to dissipate uncertainty by recognizing the inadequacies of the approaches adopted at law in resolving the employee-entrepreneur dilemma. The Board does not propose to engage in a detailed analysis of these approaches such as “control test” and “the four-fold” test nor are the shortcomings of “the statutory purpose” test at all relevant to an interpretation of the statutes’ mischief. Obviously these approaches and their relative shortcomings do to a limited degree explain and justify the need for Legislative intervention. Nevertheless it is certainly fallacious to suggest that the Legislature has thereby created an artificial limitation to the interpretation of the amendment’s purpose by restricting its scope to some pre-existing status quo. The Board perceives no such interpretative restriction to our posture in dealing with the present case having regard to our understanding of the underlying mischief contemplated by the Legislature. Indeed, in no manner has it been demonstrated by judicial authority on review of our process that the Board’s past decisions require the Legislative medication suggested in the respondent’s submissions. In addressing ourselves to the issues the Board’s task is to analyze the specific wording used in the definition of the “dependent contractor” under section 1(ga) of the Act and apply that analysis in the context of the factual circumstances before us. And, needless to say, the point upon which a particular person falls on this employee-contractor spectrum will obviously depend upon the facts and circumstances of each case. We accept as inevitable that the pronouncements heretofore applied by the Board in meeting what the respondent has characterized as the inadequacies of the past may very well have been rendered superfluous in the face of these amendments. Nevertheless, the Board need not conjecture at this point what implications that may forebode for the distinctions that will have to be made in future cases in order to accommodate the “dependent contractor” on the collective bargaining scenario.

14. The only issue placed before this Board is whether the forty truckers reviewed herein are “dependent contractors” as defined under section 1(ga) of the Act and, therefore, entitled to representation in a separate and distinct bargaining unit under section 6(4) of the Act. The respondent submits that the evidence contained in the Labour Relations Officer’s Report supports the conclusion that the truckers’ financial status was conclusively established. When ownership of the truck, the principal asset of the enterprise, is measured against the unrestricted nature of the P.C.V. license, economic mobility from customer to customer is assured. The only inference to be deduced from the truckers’ disposition to continue to provide the respondent with his haulage service is that the benefits derived discourage any such change. In any event, the respondent asserts the truckers’ freedom of mobility, whether exercised or not, is the key to his independence. Whether he elects to exploit that freedom ought not to cloud the discernment of the independent nature of his relationship with the respondent.

15. The Board agrees that the opportunity for economic mobility is a factor in measuring the degree of independence exhibited by a particular entrepreneur in meeting his finan-



cial objectives. Indeed, perhaps in a particular circumstance it may very well follow that the individual entrepreneur may fall outside the definition of "dependent contractor" notwithstanding his election to extend the benefits of his service to one particular customer. Whatever that circumstance may be we are clearly of the view that when measured against the consideration of other significant factors the individual trucker reviewed herein does not fall into that category. In examining the Labour Relations Officer's Report the Board was impressed with the length of service with the respondent of some of the truckers. In several of these instances these drivers have not demonstrated any individual initiative to indicate they were at all self-reliant in expanding the parameters of their "business." The sheer uniformity of the terms and conditions imposed by the respondent without negotiation or, indeed, often times without consultation in satisfying the trucker's financial needs, contradicts any suggestion of an entrepreneurial relationship. What are the special inducements that have been offered by the respondent in its dealings with the truckers that would persuade them to curb their growth potential by committing their business destiny to the respondent's enterprise? Indeed, on much too frequent an occasion, the evidence indicates, a driver was "shown the gate" in the event independent initiative was exercised in the refusal of a load that was viewed by him as not being particularly profitable.

16. The more realistic picture delineated in the Labour Relations Officer's Report shows the trucker to be very much the captive of the respondent's enterprise. Indeed we are satisfied that, in assessing his relationship with the respondent in the circumstances described herein, it would be financial folly for him to seek alternative and additional business by extending his delivery service to other enterprises. Let us examine the factor of ownership and furnishing of his own truck in terms of whether the trucker is indeed financially dependent or independent of the respondent. The trucker must incur the expenses of purchasing and maintaining the vehicle as well as securing the necessary licenses in connection with the operation of the business of delivering crushed stone. Who is the beneficiary of such ownership? It is true that the trucker is, as a result, eligible for tax allowances in the process of running his enterprise. But in our view the real beneficiary in the circumstances described to us is the respondent who is spared the capital expenditures of purchasing a fleet of trucks and the concomitant maintenance expenses heretofore noted that are in fact shifted to, and assumed by, the individual trucker. It is true, as the respondent asserts, that the trucker is deprived of such benefits as statutory holiday pay, vacation pay, minimum wages, maximum hours, unemployment insurance and workmen's compensation. But again, who is the beneficiary? Is the trucker in the operation of the enterprise shown to be compensated for the sacrifice of these benefits otherwise extended employees? Has the risk assumed and the investment incurred in the operation of his business, having regard to the individual contract signed at the respondent's insistence, shown to be worthy of a business man of reasonably independent means? Surely the respondent's enterprise gains by virtue of the removal of the administrative expenses of having to make the necessary deductions and contributions to these patently costly employee benefits. And, once more is it solely to the trucker's benefit that he is compelled by the respondent to assume a minimum of \$300,000.00 third-party liability insurance in the operation of the vehicle? Does not the common law as conceived by the courts exculpate the respondent from the liability of its agent by virtue of its exhortations of an absence of control over the manner in which the trucker performs his duties? And, finally, although the respondent does not act as guarantor with respect to securing of the necessary loans with respect to the purchase of the vehicle the trucker, nonetheless, must establish himself as a worthy credit risk by obtaining a letter of recommendation from the respondent. In no instance was it demonstrated that a driver, when

confronted with the need for a loan, would secure the recommendation of any one of his other customers. (See: *The Fownes Construction Ltd.* case (supra) at p. 456 where specific reference is made to the relevance attached to the ownership and furnishing of tools.) Even in the quest of an opportunity to increase his income the trucker manifests a propensity to rely upon the respondent to assist him in securing temporary work whether it be snow removal services performed at the instance of the Town of Burlington or the intermittent haulage of a load of crushed stone through one of the respondent's related companies or one of the respondent's customers. Indeed, in absence of any evidence beyond the primitive and rudimentary trappings indicative of incipient business potential the Board can discern little capacity for entrepreneurship amongst the truckers that justifies attributing an independent characteristic to the manner in which he conducts his affairs. Indeed such conduct, inclusive of the marketing of his skills and the application of his vehicle are not so dissimilar to the obligations undertaken by an employee in applying his skills in the service of his employer. In having regard to the economic reality of the trucker's relationship with the respondent and his dependency upon the respondent for the making of his livelihood, the Board is satisfied that he ought to be treated as a "dependent contractor" under section 1(ga) of the Act. In ascribing a guideline to be applied with respect to measuring the extent of the economic dependency of the "contractor" the Board refers to a statement made by the Canada Labour Relations Board in *Midland Express Ltd.*, case 74, CLLC, # 16,104, at p.844:

"Surely the test of control to be applied now to the dependency is of an economic nature. Are the persons involved obliged to sell their services in a market in which they are economically dependent on a single or a restricted few purchasers? Is their freedom to contract with any degree of independence so thwarted that they are in fact in a status equivalent to that of individual employees? One can envisage situations in which a person who would be completely independent from any employer-employee relationship in the common law contractual sense and yet would be absolutely dependent in such an economic sense."

17 Before leaving this phase of the case and in addressing ourselves to the respondent's submissions with respect to the requirement of the existence of "a continuing obligation" as a condition precedent to determining the "dependent" relationship, we repeat our observations made at the hearing – that no such condition need be read into the Legislature's intent. In the particular circumstances of this case we are satisfied, notwithstanding the expiry of the individual contract, that upon the truckers' acceptance of a load for delivery an obligation arises, vis-a-vis the respondent. This is especially the case in the construction industry where business relationships are inherently ephemeral and ambulatory in nature. In other words, imposition of the requirement of a continuing obligation with respect to determining the nature of the contractor's relationship with the user of his services is an unnecessary restriction upon the Legislature's purpose. (See again *The Fownes Construction Company Ltd.* case [supra] at p. 462.)

18 The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

19. The Board further finds that all employees engaged as truckers working at or out of the respondent's quarry at Burlington, Ontario, save and except dispatcher, persons above the rank of dispatcher, office staff and persons represented by subsisting collective



agreements, constitute a unit of employees of the respondent appropriate for collective bargaining.

20. For purposes of clarity "all employees" refers to truckers found to be "dependent contractors" under section 1(ga) of The Labour Relations Act and therefore are to be treated as employees under section 1(gb) of the Act.

21. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on 17th February, 1976, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of the Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

22. A certificate will issue to the applicant.

#### **DECISION OF BOARD MEMBER J.E.C. ROBINSON, Q.C.:**

My dissent with respect to the issue of the status of the "dependent contractor" will be forthcoming.

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**1277-76-U** London and District Service Workers' Union, Local 220,  
S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant) **Kitchener-Waterloo Hospital,**  
(Respondent).

**S79 - Discharge For Union Activity - Effect of employer refusal to re-schedule grievor's break periods to allow her to participate in October 14th protest - Effect of grievor leaving work for this purpose - Whether discharge unlawful.**

**BEFORE:** Ian C.A. Springate, Vice-Chairman and Board Members A. Gribben and Fraser D. Kean.

**APPEARANCES:** *Ted Wohl and Al Campbell for the applicant; H.A. Beresford, James Spencer, John Heldmann and R. Graham Nelson for the respondent.*

**DECISION OF THE BOARD:** February 8, 1977.

1. This is a complaint which alleges that the respondent has dealt with the grievor, Mrs. C. Lauzon, contrary to the provisions of section 58(a) of The Labour Relations Act.

2. The grievor was, until fairly recently, employed as a secretary in the respondent's purchasing department. She ceased working for the respondent on October 14, 1976 as a result of a series of events connected with the "Day of Protest" organized by the Canadian Labour Congress to express its dissatisfaction with the Federal Government's Anti-Inflation Program.



3. The grievor, who was first hired by the respondent in August of 1974, did not come within a bargaining unit represented by a trade union. However, she is, and has been for some time, a strong supporter of the trade union movement. Mr. Graham Nelson, who as the respondent's purchasing agent was the grievor's immediate supervisor, testified that the respondent has long been aware of the grievor's support for the trade union movement. Indeed he stated that during her first year of employment with the respondent the grievor had at one point refused to place a purchase order with a local hardware dealer because it involved the purchase of a product made by a company in the United States whose employees were on strike. According to Mr. Nelson in the end he had to place the order himself. Mr. Nelson also stated that about two years ago it had come to his attention that the grievor was seeking to organize employees on behalf of the Confederation of National Trade Unions, although it was his understanding that she had since that time become a supporter of the Service Employees' International Union. It was his further testimony that he had been aware in late 1975 and early 1976 that the grievor was approaching employees to have them sign union cards. He also stated that in October of 1975 the grievor was issued a formal warning concerning her non-work related visits to employees in other departments.

4. As noted above both Mr. Nelson and the grievor work in the respondent's purchasing department. This department's total complement is rounded out by two additional persons, namely Mr. Jones the director of purchasing and a second secretary who was, at the material time, off from work due to a death in her family. At about 9.10 a.m. on October 14th the grievor approached Mr. Nelson and asked if she could consolidate her two 15-minute coffee breaks and her half-hour lunch break, which generally commenced at 12.30 p.m., so that she could be away from work from 11.00 a.m. to noon to take part in a protest against the Anti-Inflation Program. Mr. Nelson at that point went to consult with Mr. Jones.

5. Some 15 minutes later the grievor was called into Mr. Nelson's office and informed that her request was being denied. The grievor testified that the only reason communicated to her for this decision was that her request was not a bona fide one. Mr. Nelson, however, stated that two additional reasons were also mentioned to her for this decision, namely that the respondent could not afford the change since it was short-staffed, and also because of the short notice the respondent had received concerning the request, namely something less than two hours.

6. After being informed of the respondent's refusal to grant her request, the grievor then posed the question as to what would happen to her if she nevertheless left to attend the demonstration. In her testimony the grievor herself stated that Mr. Nelson's response to this question was, "in that case I'm afraid you won't be working here anymore." Following this reply the phone rang, and Mr. Nelson excused himself and turned to answer it. The grievor at that point left the respondent's premises never to return. It was the grievor's testimony that she left when she did because she felt she would have been fired in any event at 11.00 o'clock.

7. Approximately four days after the grievor walked out of the hospital an officer of the complainant trade union telephoned Mr. James Spencer, the respondent's Director of Hospital Services, in an attempt to convince him that the respondent should reinstate the grievor. Mr. Spencer's reply was that the grievor had "quit" and that he supported the position already taken by the grievor's department head.

8. The grievor's motivation in doing what she did clearly sprang from her conviction as to the importance of the demonstration against the Anti-Inflation Program. Indeed when asked by counsel for the respondent why she had left work when she was aware of what the consequences would be, the grievor responded that she thought that an extremely important issue was involved, and that she had already gone on record outside the hospital in stating that it was an extremely important issue. The grievor, however, also added that if she had felt that the respondent had really required her services from 11.00 a.m. to noon she would in fact have stayed at work during that period.

9. The respondent's motivation in denying the grievor's request is somewhat more difficult to determine. We feel confident in stating, however, that the respondent's position was not adopted with the aim of "getting rid" of the grievor because of her union activity or possible union membership. The respondent had for some years known about the grievor's active involvement with, and support of, trade unions, including the applicant union, and had never sought to discharge her because of it. This is true even though in a couple of instances the grievor's own actions might arguably have been used to justify such a step. Further, we are satisfied that had the grievor stayed at work on October 14th and taken her regular lunch and coffee breaks, she would in all probability still be employed by the respondent today.

10. Although Mr. Nelson in his testimony stated that to comply with the grievor's request would have led to a number of difficulties for the purchasing department (a contention disputed by the grievor), we are satisfied that it was in fact feasible for the respondent to allow the grievor to take her lunch and coffee breaks together from 11.00 a.m. to noon. Further, we are also of the opinion that had the grievor asked permission to consolidate her breaks for certain other reasons, such as to allow her to see her physician or to attend to some pressing family matter, such permission would in fact have been forthcoming. We base this opinion not only on Mr. Nelson's statement that the respondent did not view the grievor's request as being a "bona fide" one, but also on his testimony concerning the respondent's policy of seeking to accommodate employee requests for time off for health reasons such as visits to a doctor, as well as for important family situations. In this case, of course, the grievor was not requesting time off but only the re-arrangement and consolidation of the time of her lunch and coffee breaks.

11. Having reached this point we now turn to the issue of whether or not the respondent violated section 58(a) of the Act by first denying the grievor's request to alter the timing of her work breaks so as to allow her to attend a demonstration against the anti-inflation program even though it probably would have granted a similar request for certain other purposes, and by then refusing to reinstate her when she left work despite a warning that to do so would result in the termination of her employment. Section 58(a) states as follows:

"58. No employer, employer's organization or person acting on behalf of an employer or an employer's organization,

- (a) shall refuse to employ or to continue to employ a person; or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;"



12. As noted above, we are of the view that the position adopted by the respondent with respect to the grievor's request was not aimed at severing her employment relationship with the respondent because of her activity on behalf of, or any possible membership in, a trade union. Thus if a breach of section 58(a) has occurred it must be because the respondent has either refused to continue to employ or refused to reinstate the grievor because she was exercising some other right under the Act. Counsel for the complainant argued that such a right was the right of the grievor pursuant to section 3 of the Act to participate in the complainant's lawful activities. The lawful activity involved, he submitted, was the demonstration against the anti-inflation program.

13. Attending a demonstration against the anti-inflation program is, of course, a lawful activity. However, what the Board in reality is being asked to hold in this case is that the right to attend such a demonstration during regularly scheduled working hours is an activity protected by The Labour Relations Act. This we decline to do, even on the assumption that such a demonstration is a union activity within the meaning of section 3 of the Act. While employees certainly have the right to participate in lawful union activities, this right does not go so far as to put a positive obligation on employers to alter established work schedules so as to facilitate this participation. Further, the mere fact that an employer may voluntarily agree to change work schedules for certain specific purposes does not have the effect of creating a general obligation upon him to do so. Just as the respondent was free in this case to refuse a request by the grievor to have her breaks consolidated so as to allow her the time to attend a political rally or a social event, so it was also free to disallow the change where she wanted to attend a union sponsored activity.

14. On the basis of this determination we find that the respondent's refusal to consolidate the grievor's lunch and two coffee breaks so she could take all three at 11.00 a.m. on October 14, 1976 did not constitute a violation of section 58(a) of the Act. Further, we are also satisfied that the refusal of the respondent to reinstate the grievor some four days later when requested to do so was on balance more likely to have been as a result of the respondent's actions on October 14th rather than due to any anti-union motive on the part of the respondent. In this regard we would again note that the grievor was warned that her employment would be terminated if she left work without permission at 11.00 a.m. and that at that point in time she took it upon herself to leave without even waiting for 11.00 o'clock to arrive.

15. Before leaving this matter it should be noted that the above determinations are limited strictly to the issue of whether or not the respondent by its actions has violated section 58(a) of The Labour Relations Act. Issues such as the "fairness" of the respondent's actions or the wisdom of its position with respect to the grievor's request on October 14th are not matters which fall within the jurisdiction of this Board to determine in the context of a complaint such as this one.

16. This complaint is hereby dismissed.

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**1162-76-U United Garment Workers of America, (Complainant), Four B Manufacturing Ltd., (Respondent).**

**S79 – Whether employees laid off because of their trade union activity – Effect of reversal of onus of proof where complainant calls evidence but respondent calls no evidence.**

**BEFORE:** D.H. Kates, Vice-Chairman and Board Members H.J.F. Ade and E. Boyer.

**APPEARANCES:** *Pamela Sigurdson and Andre Bekerman for the complainant; Burton Kellock for the respondent.*

**DECISION OF D.H. KATES, VICE CHAIRMAN, AND BOARD MEMBER E. BOYER:**  
February 3, 1977.

1. The name "Four B's Manufacturing Ltd." appearing in the style of cause of this complaint is amended to read "Four B. Manufacturing Ltd.
2. This is a complaint filed under section 79 of the Act alleging that the grievors named in the complaint, as amended, were dealt with by the employer contrary to sections 56, 58(a), (c), 61 and 71 of the Act.
3. The respondent employer challenged the jurisdictional competence of this Board to entertain this complaint. The basis of this jurisdictional challenge was exhaustively dealt with by another panel of this Board in a concurrent application for certification affecting the same two parties. (See: *The Four B Manufacturing* case, Board File No. 1126-76-R, decision dated 17th December, 1976). Counsel advised the Board that he has been instructed to apply to the Divisional Court for review of that decision. Obviously, should counsel's attempt to quash prove successful it may very well be that any determination made herein would be without legal effect. In any event, the Board resolved to proceed with the complaint without prejudice to the respondent's preliminary motion.
4. At the outset of the case the Board looked to counsel for the respondent to proceed with its evidence in answer to the complainant's allegations. Counsel advised that whatever procedural practices have been adopted by the Board with respect to the reverse onus provisions contained in section 79(4a), it was not his view that the mere filing of the complaint (a piece of paper) triggered any duty on his client's part to satisfy the onus requirements of the Act. Implicit in the respondent's position was the necessity for the complainant trade union to adduce some threshold evidence in support of the alleged wrongdoings before the reverse onus should be deemed to have become operative. As a result counsel advised the Board that he was not prepared to adduce any evidence.
5. Counsel for the complainant union, without prejudice to its interpretation of the requirements of the reverse onus provisions contained in section 79(4a) elected to adduce evidence in support of its allegations of employer wrongdoing. These allegations are set out in paragraph 4 of the complaint:

"4. The following is a concise statement of the nature of each act or omission complained of:

(a) On or about the 27th day of September, 1976 the grievors were dealt with by Carl Brant, General Manager, and President of the Respondent, contrary to the provisions of Sections 56, 58(c) and 61 of the Labour Relations Act, in that he did on his own behalf and on the behalf of the Respondent tell the grievors during their coffee break that he was annoyed that the employees were "sneaking around behind my back" by joining a union. He made it clear, both by the tone of his voice and his reference to lay-offs that the grievors' jobs were in jeopardy. Further, Mr. Brant instructed the grievors to sign a form stating that they wished to withdraw their names from the proposed union. The forms were provided by the Assistant Manager.

(b) On or about the 28th day of September, 1976, the grievor, Nancy Sparks, was dealt with by the said Carl Brant, contrary to the provisions of Sections 56, 58(c) and 61 of the Labour Relations Act, in that he did "on his own behalf and on behalf of the Respondent accuse the said grievor of causing a disturbance in the Respondent by being involved in the union. He informed the grievor that she might not be needed by the Respondent and that the Respondent could "do without her".

(c) On Wednesday, the 29th of September, 1976, the grievors, Karen Lewis and Shirley Lalonde, were dealt with by the said Carl Brant, contrary to the provisions of Sections 56, 58(c) and 61 of the Labour Relations Act, in that he did on his own behalf and on behalf of the Respondent inform the grievors that he was displeased with their union activity and referred to the possibility that they would be laid-off. Mr. Brant chastised the grievor, Lalonde, for refusing to sign the form referred to in paragraph (a) above and requested that she sign said form.

(d) On the 30th of September, 1976 the grievors were dealt with by the said Mr. Brant contrary to the provisions of Sections 56, 58(c), 61 and 71(1) of the Labour Relations Act in that he did on his own behalf and on behalf of the Respondent, inform the grievors that if the organizational attempts of the grievors and their union continued that there would be significant layoffs in the plant."

These allegations were amended as a result of letters from counsel for the complainant dated October 27, 1976 and November 8, 1976 respectively:

"27 October, 1976.

Re: Application Under Section 79 4B Manufacturing Ltd. & United Garment Workers  
Your File 1162-76-U

Please be advised that the complainant desires to add the following allegation to paragraph 4: (e)

"The Respondent has failed to recall the grievors Sparks and Lewis according to their seniority. The grievors were laid off by the respondent and it has always been the respondent's practice to recall according to seniority."

"8 November, 1976.

Re: United Garment Workers & 4B Manufacturing  
Your File 1162-76-U

The Complainant desires to amend its Complaint under Section 79 as follows:

- "1. The Respondent has, in addition to sections 56, 58(c), 61 and 71(1), acted contrary to the provisions of Section 58(a).
2. The Complainant desires to add the name of Carole Lewis, Shannonville, Ontario (Phone 613-962-1038) to its list of grievors.
3. The relief requested includes the re-instatement, with full benefits and retroactive salary, of the grievors Nancy Sparks, Karen Lewis and Carole Lewis.
4. The reference in Paragraph 4(e), added on October 27, 1976, applies to Nancy Sparks and both Carole and Karen Lewis.
5. The allegations in paragraph 4(a), (b), (d) and (e) are contrary to Section 58(a) of the Act."
6. The grievor, Miss Nancy Sparks, was the sole witness called to adduce evidence in these proceedings. She stated that she knew each of the other grievors against whom it is alleged discriminatory sanction was imposed by the respondent. She was hired on July 21st, 1976; the other grievors were hired at approximately the same time, or shortly thereafter. Each of the four grievors who were laid off on October 7, 1976, were terminated along with twenty-eight other employees assigned to the second production line in the respondent's manufacturing plant. The reasons for the lay-off at the time was an alleged shortage of work created as a result of a "wild-cat" strike at the Bata plant. The respondent is the processor of the boot portion of "the sneaker shoe" manufactured by the Bata Company. The respondent is dependent upon the Bata plant for materials and supplies in its manufacturing process. As a result of the "wild-cat" strike materials and supplies were cut off. At all material times the evidence established that the respondent was experiencing financial difficulties in the operation of its enterprise as reflected in the need to borrow monies to meet employees' payroll.
7. Miss Sparks testified that she was actively involved in the signing up of members in support of the complainant's attempts to organize the respondent's plant employees. She described a series of meetings in late September attended by herself, the grievors and other employees that were convened by Mr. Carl Brant, the president of the respondent company. At these meetings the employer sought to persuade employees to frustrate the complainant's campaign. The Board was advised that Mr. Brant accused employees "of going behind his



back” in supporting the union’s campaign. He advised that these employees were “troublemakers”. Representations were made with respect to the efficacy of “the shop committee” system when compared to trade union representation. As a result of these representations a vote amongst employees indicated they favoured the shop committee. This course of events precipitated the circulation of a petition distributed by Sylvia Miracle, the assistant production manager, who left the document at the employees’ work station for their signature. At all material times the clear and uncontradicted message conveyed to the employees was an anti-union expression of employer resistance to the prospect of union representation.

8. Miss Sparks had worked, prior to being engaged by the respondent, with The H.D. Lee Company. At that time she became a member of the complainant trade union. She was familiar with the operation of the machines at the respondent’s plant as a result of her experience at The H.D. Lee Company. At the commencement of her employ with the respondent company she was given a variety of jobs. After these meetings of employees described above she was interviewed by Mr. Carl Brant and was questioned with respect to her job preferences. Three days prior to her lay-off she was assigned to a permanent position on the respondent’s second production line. And a week prior to the employer’s attempt to dissuade employees from supporting the complainant trade union Miss Sparks was asked by Mr. Arnold Brant, another owner, to forestall the campaign by two weeks.

9. At the close of the complainant’s case the respondent elected not to call any evidence. Not only was the evidence of employer interference in the complainant’s campaign uncontradicted, but counsel advised that he was prepared to adopt the complainant’s evidence as the respondent’s own. Counsel submitted that the evidence adduced through Miss Sparks was insufficient to necessitate any requirement on the respondent’s part to discharge the onus contemplated by section 79(4a) of the Act. On the contrary, the respondent was satisfied that evidence heard by the Board was sufficient to establish the real reason for the respondent’s lay-off of the thirty-two employees on October 7, 1976. Aside from this matter there was basic agreement that the complainant had failed to put forward any evidence on a number of the allegations made in the complaint and referred to in paragraph 4 herein.

10. It is unnecessary for the Board in disposing of this complaint to develop our posture with respect to the reverse onus provisions of the Act. Suffice it to say for present purposes that there is a radical departure between the respondent’s perception of the requirements of section 79(4a) of the Act and the Board’s pronouncements on this subject made in its recent decisions. It may be safely concluded that the Board has rejected the requirement as a condition precedent “to triggering” the reverse onus that a complainant trade union must establish a *prima facie* case (or some threshold evidence) in support of its allegations of wrongdoing contained in the complaint. The Board has clearly gone on record in support of the proposition that “on an inquiry by the Board into a complaint ... that a person has been discharged ... contrary to the Act”, section 79(4a) “must be seen to contemplate a single burden, that burden being the burden it expressly places upon the employer.” (See: *The I.C.B. Warehousing Division of Alor-Anson* case, (1976 OLRB Rep. October 621 at page 632.) This posture has since been refined and developed by the Board in the *A.A.S. Telecommunications Ltd.* case, (Board File No. 0751-76-U) where it was stated:

“13. The legal effect of the reverse burden established by section 79(4a) of the Act, has now been considered in a number of decisions of this

Board. First of all, it is clear that the reverse burden may be resorted to at the end of a case when the clear inference can be drawn. In such a case, the burden, not having been discharged by the employer, the Board must find that the employer's conduct falls within the statutory prohibition. See *Barrie Examiner*, [1975] OLRB Rep. Oct. 745. A secondary implication of the reverse burden is that it also operates to induce an employer to come forward with an explanation of the conduct that is the subject of a complaint. The Board has determined that a complainant need not establish a *prima facie* case of an employer contravention in order for the reverse burden to apply, the filing of a complaint in respect of an employee being a sufficient condition for its application. (See *I.C.B. Warehousing*, [1976] OLRB Rep. Oct. 621) The lack of any requirement for a complainant to establish a *prima facie* case of an employer contravention means that an employer either must come forward with some evidence in the way of an explanation or run the real risk of the Board facing an evidential situation from which it is unable to draw any clear inference. Recognizing that, as a practical matter, the employer must provide some evidence in the way of an explanation, the Board when dealing with a complaint to which section 79(4a) applies has adopted as its standard practice the procedure of having the respondent proceed first.

- "14. The existence of the reverse burden of proof, however, does not mean that the determination of employer motive has now become an easy task for the Board. The Board is still faced with the problem of assessing the evidence presented to it and drawing inferences from that evidence. There are many cases in which employers come forward with plausible explanations of their conduct from which it can be inferred that an employer's conduct is not in contravention of the Act. As a tactical matter, in these cases the complainant must introduce evidence to rebut that inference since, in the absence of any evidence from the complainant, the Board would conclude that the employer has met the burden imposed on it by section 79(4a). The result is that, in most cases, the Board has presented to it evidence from both the employer and the complainant. This evidence must then be assessed and inferences must be drawn. Such factors as the existence of union activity and of the employees' involvement in that activity, the manner in which the employee was discharged, and the credibility of the witnesses must all be considered. The Board's responsibility to assess the evidence, therefore, is one that cannot be avoided by seeking refuge in the reverse burden."

11. The Board appreciates that the Legislature, in introducing the reverse onus provisions into the Act, has entrusted us with the discharge of a difficult responsibility. Nevertheless, in executing that responsibility the Board recognizes that the Legislature intended that an industrial relations reality, however unfortunate, be accepted. That is to say, implicit in the course of a trade union's organizational campaign, any prejudicial act taken against affected employees must be justified by a credible explanation free of an anti-union motive. (See: *The Barrie Examiner* case; [1975] OLRB Rep. 745 at page 749.) Failure by the em-



ployer to satisfy that onus, notwithstanding the existence of an ostensibly legitimate reason for the alleged wrongdoing, will result in a positive finding of the committal of an unfair labour practice. We are of the view that underlying these requirements is the premise that only the employer knows the real reason for the acts taken to the employees' prejudice.

12. In the instant case, the complainant did not elect to invoke the reverse onus provisions of the Act as perceived by the Board to justify its claim for relief. Although not necessarily under any particular duty to adduce evidence the complainant elected to call Miss Sparks to the stand. Miss Sparks, by virtue of the uncontradicted nature of her testimony, testimony adopted by the respondent as sound, established to our satisfaction that the grievors at all material times were employees of the respondent, that they were laid off by the respondent and the said lay-offs were effected in the atmosphere of the complainant's organizational campaign. Surely such evidence ought to have been sufficient "to trigger" the need for some employer explanation for the lay-off whatever one's perception with respect to the operation of section 79(4a).

13. The respondent may very well argue that the explanation given Miss Sparks at the time of her lay-off on October 7, 1976 ought to suffice as justification for the recourse taken. It is our view that whatever the ostensible reason may have been for the lay-off the victim of a prejudicial act is often the last person to know or appreciate the real reason. Quite clearly the object of section 79(4a) is to establish "the real reason" for the acts complained of by compelling the respondent employer to provide first hand evidence of that reason. The Board is of the opinion that that objective can only be achieved through the representatives of the respondent responsible for the lay-off taking the stand and subjecting their reasons to the scrutiny of cross-examination under oath. It surely does not lie in the mouth of a respondent to rely on the self-serving hearsay of the victim of the dispute to establish the credibility of the employer's reason for the discharge.

14. The Board, moreover, finds that there is clear, uncontradicted, evidence of overt employer antipathy towards the complainant in its attempt to organize the respondent's employees. In failing to call any of the respondent's representatives implicated in the anti-union activity described in evidence we are entitled to infer an adverse result. That is to say that such representatives, if called to adduce evidence, would have given testimony unfavourable to the respondent's case. (See: *The McGregor Hosiery case*, [1976] OLRB Rep. 583 at p. 595.) The Board therefore finds that in having regard to the uncontradicted evidence before us, the respondent has failed to discharge the onus attendant upon it of presenting a reasonable and credible explanation for the lay-offs complained of. Rather, the Board has not been satisfied that the said lay-offs were effected in a manner that was free from an anti-union motive.

15. The Board therefore directs that the grievors be reinstated forthwith with compensation for loss of wages and other benefits subject to the usual deductions. The Board shall remain seized in the event of a failure to implement this decision.

#### **DECISION OF BOARD MEMBER H.J.F. ADE:**

1. I concur in the result reached by the majority; however, I wish to dissociate myself from certain *obiter* statements concerning the effect of the "reverse onus provisions" contained in section 79(4a) of the Act.



2 This is a complaint filed pursuant to section 79 of the Act in which a number of allegations of unlawful conduct have been made. The complainant adduced evidence of its organizing campaign and the respondent's response to that campaign. As indicated in paragraph 12 of the majority decision, the complainant did not elect to invoke the reverse onus provisions of the Act in order to justify its claim for relief, but called evidence which if uncontradicted might lead to an inference of a violation of the Act. This evidence was not, in fact, contradicted, but was adopted by the respondent which chose to call no evidence of its own.

3. In these circumstances I am prepared to find that the union has established a *prima facie* case and that the onus rests upon the respondent employer to adduce evidence to rebut that case or negate the inferences which the complainant asks us to draw. The complainant, having failed to do so, I must concur with the majority in finding that the complainant has not satisfied the onus placed upon it.

4. In paragraph 10 of their decision, the majority remarks "It is unnecessary for the Board in disposing of this complaint to develop our posture with respect to the reverse onus provisions of the Act". Nevertheless, the Board goes on to do just that, citing the *I.C.B. Warehousing* and the *A.A.S. Telecommunications* cases. It was unnecessary for us to decide whether a union must establish a *prima facie* case before it could rely on the reverse onus provisions of section 79(4a), and consequently, these remarks are clearly *obiter*. Indeed, the majority decision cites extensively from the *A.A.S. Telecommunications* case and in that case too, the discussion of "*prima facie* case was *obiter* since at paragraph 20 of that decision, the majority remarked:

"These considerations along with our assessment of the credibility of the witnesses lead us to conclude that Potts and Stockfish were dismissed on July 14th because of their involvement in the complainant's organizing drive. *This conclusion in no way depends on the existence of the reverse burden.*"

5. If we had been asked to determine whether the employer was deemed to be "guilty until proven innocent" or whether the union was required to tender at least some evidence of improper conduct before it could rely on the reverse burden, I would have taken the latter position. However, we were not asked to decide that issue. Had we been, I would not have agreed with the opinion expressed by the majority on that matter.







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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1977

### BARGAINING AGENTS CERTIFIED DURING JANUARY

#### No Vote Conducted

**0674-75-R** The Association of Professors of the University of Ottawa (Applicant) v. University of Ottawa (Respondent) v. Canadian Union of Public Employees (Intervener).

Unit: "all full-time academic staff and professional counsellors employed by the Respondent in the City of Ottawa, in the Regional Municipality of Ottawa-Carleton and all full-time academic staff to whom at least 50% of the salary at the University is paid by the Respondent save and except members of the Board of Governors, members of the Joint Committee of the Board of Governors and Senate, Rector, Vice-Rectors, Assistant Vice-Rectors, Secretary to the University, Deans, Director of the institute for International Co-operation, Director of the Counselling Service and/or persons holding acting appointments and so acting in the above positions, one member of the academic staff of each Faculty or School (except the Faculty of Law) appointed by the Dean for the purposes of assisting with academic staff relations, all full-time academic staff engaged in the practice of medicine in the course of clinical teaching of medicine, members of the full-time academic staff employed on a full-time basis in a position outside this bargaining unit." (8 employees in the unit). (*clarity note* – see Report of full decision [1977] OLRB Rep. January).

**0402-76-R** International Molders & Allied Workers Union (applicant) v. Goodwill Electric Supplies Limited (Respondent).

Unit: "all office and clerical employees of the respondent at Brantford, save and except Branch Manager, Assistant Branch Manager, and Purchasing Agent(s)" (4 employees in the unit).

**1082-76-R:** Canadian Union of Public Employees (Applicant) v. The Children's Aid Society of the District of Nipissing (Respondent).

Unit: "all persons regularly employed for not more than 24 hours per week and students employed by the respondent during the school vacation period at its offices at North Bay and in the District of Nipissing, save and except supervisors and persons above the rank of supervisor." (5 employees in the unit).

**1110-76-R:** United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Trent Metals Limited (Respondent) v. Group of Employees (Objectors).

Unit #2: "all employees engaged as trainees under The Canada Manpower Industrial Training Programme by the respondent company at Peterborough, save and except foremen, persons above the rank of foreman, office and sales staff." (1 employee in the unit). (*Bargaining Unit 1 – See Certification Dismissed Subsequent to Post-Hearing Vote*).

**1126-76-R:** United Garment Workers of America (Applicant) v. Four B Manufacturing Limited (Respondent) v. Group of Employees (Objectors).



Unit: "all employees of the respondent at its plant on Airport Road; Tyendinaga Indian Reserve No. 38 save and except foremen, foreladies, those above the rank of foreman, forelady, office staff and sales staff." (68 employees in the unit).

**1396-76-R:** Amalgamated Clothing and Textile Workers Union Toronto Joint Board (Applicant) v. Copley, Noyes & Randall Limited (Respondent).

Unit: "all employees of the respondent in Hamilton, Ontario, who are not presently covered by collective agreement save and except supervisors, persons above the rank of supervisor, office and sales staff, handymen, sewing machine mechanics, salaried designers and designers in training, operating engineers and persons regularly employed for not more than 24 hours per week." (43 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1977] OLRB Rep. January).

**1473-76-R:** The Carpenters' District Council of Toronto and vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 1747, 1304, 2480, 2482, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. A.V. Tennant General Contractors Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Count of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit.)

**1577-76-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (applicant) v. Markham Construction Company Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esqueving and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1578-76-R:** Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Walt's Plumbing and Heating Limited (Respondent)

Unit: "all plumbers, plumbers' apprentices, sheet metal workers and sheet metal apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*having regard to the foregoing*)

**1592-76-R-:** United Plant Workers of America Local 1962 (applicant) v. Greater York Property Management Limited (Respondent).

Unit #1: "all security guards employed by the respondent at 900 Dufferin Street (Dufferin Mall), Municipality of Metropolitan Toronto, save and except assistant supervisor, persons above the rank of assistant supervisor and security guards regularly employed for not more than twenty-four hours per week." (5 employees in the unit). (*having regard to the agreement of the parties*). Bargaining Unit #2 – See Application Certified Subsequent to Post-Hearing vote).

**1602-76R:** Canadian Food and Allied Workers Union Local 725 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Oak Pharmacies Limited (Respondent).

Unit: “all employees of Oak Pharmacies Limited at its stores in Hamilton, Ontario, save and except the manager, persons above the rank of manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (2 employees in the unit).

**1603-76-R:** Canadian Food and Allied Workers Union Local 725 Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Oak Pharmacies Limited (Respondent).

Unit: “all employees of Oak Pharmacies Limited at its stores in Hamilton, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (3 employees in the unit).

**1609-76-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitters Industry of the United States and Canada (Applicant) v. Hydro Flow Systems (Respondent).

Unit: “all plumbers, plumbers’ apprentices, steamfitters, steamfitters’ apprentices, gas fitters and gas fitters’ apprentices in the employ of the respondent within a twenty mile radius of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit). (*clarity note* – see Report of full decision [1977] OLRB Rep. January).

**1611-76-R:** United Steelworkers of America (Applicant) v. Drug Trading Company Limited (Respondent).

Unit: “all office and clerical employees of the respondent company in Windsor, Ontario, save and except supervisors, persons above the rank of supervisor, registered pharmacists and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (2 employees in the unit). (*Having regard to the agreement of the parties.*)

**1612-76-R:** United Steelworkers of America (Applicant) v. Drug Trading Company Limited (Respondent).

Unit: “all employees of the respondent in Windsor, Ontario save and except foremen, persons above the rank of foreman, registered pharmacists, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (5 employees in the unit). (*Having regard to the agreement of the parties.*)

**1621-76-R:** International Beverage Dispensers’ and Bartenders’ Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union A.F.L. – C.I.O. – C.L.C. (Applicant) v. Egerton’s Restaurant (Respondent).

Unit: “all employees of the respondent at Egerton’s Restaurant, 70 Gerrard Street East, Toronto, save and except office employees, assistant manager and those above the rank of assistant manager.” (33 employees in the unit).

**1627-76-R:** International Association of Machinists and Aerospace Workers (Applicant) v. Kahn Optical Company Limited (Respondent).

Unit: “11 employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman or forelady, office and sales staff.” (41 employees in the unit). (*Having regard to the agreement of the parties.*)

**1630-76-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Commonwealth Construction Company Limited (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers Local 759 (Intervener #1) v. United Brotherhood of Carpenters & Joiners of America, Local 1669 (Intervener #2).

Unit: "all employees of the respondent working as instrumentmen, rodmen, chairmen and party chief, in the District of Thunder Bay, save and except field engineers and persons above the rank of field engineer." (6 employees in the unit). (*clarity note* see Report of full decision [1977] OLRB Rep. January).

**1638-76-R:** Association of Allied Health Professionals: Ontario (Applicant) v. The Board of Governors of the Kingston Hospital, commonly known as Kingston General Hospital (Respondent) v. Ontario Public Service Employees' Union (Intervener).

Unit #1: "all paramedical employees of the respondent at Kingston and their assistants, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, persons regularly employed for not more than 24 hours per week, and persons covered by subsisting collective agreements." (65 employees in the unit).

Unit #2: "all paramedical employees of the respondent at Kingston and their assistants regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, and persons above the rank of supervisor." (12 employees in the unit). (*clarity note* – see Report of full decision [1977] OLRB Rep. January).

**1639-76R:** Chatham Construction Workers Association, Local No. 53 affiliated with the Christian Labour Association of Canada (Applicant) v. Tricon Electric (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

**1645-76-R:** International Brotherhood of Electrical Workers Local Union 586 – Ottawa (Applicant) v. Lorne's Electric (Respondent). Unit: "all electricians and electricians' apprentices in the employ of the respondent in the County of Renfrew, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

**1646-76-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Chubb Fire Security Division of Chubb Industries Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1649-76-R:** Christian Labour Association of Canada (Applicant) v. Eterno Enterprises Incorporated (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to the foregoing*).



**1686-76-R:** Service Employees Union, Local 204, affiliated with the A.F. of L., C.I.O. C.L.C. (Applicant) v. Kennedy Lodge Nursing Home (Respondent).

Unit: "all employees of Kennedy Lodge Nursing Home at 1400 Kennedy Road in Metropolitan Toronto, save and except Registered Nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week, and students employed during school vacation period." (73 employees in the unit).

**1695-76-R:** Service Employees Union, Local 478, A.F. of L., C.I.O., C.L.C. (Applicant) v. Belvedere Heights Home for the Aged (Respondent).

Unit: "all employees regularly employed at the Home in Parry Sound for not more than twenty-four hours per week, save and except professional nursing staff, physiotherapists, occupational therapists, adjuvants, supervisors, foremen, persons above the ranks of supervisor and foreman and office staff." (20 employees in the unit). *(Having regard to the agreement of the parties).*

**1698-76-R:** Christian Labour Association of Canada (Applicant) v. H. Teeuwsen Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in the unit).

**1699-76-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Armbro Materials & Construction Limited (Respondent).

Unit: "all employees of Armbro Materials & Construction Ltd. engaged in the aggregate production operation at the respondent's pit in Caledon Township, save and except foreman and dispatchers, persons above the rank of foreman and dispatcher, laboratory technicians, office and sales staff, students employed during the school vacation period and persons covered by a subsisting agreement. (3 employees in the unit).

**1701-76-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Sam Adelstein & Company Limited (Respondent).

Unit: "all employees of the respondent at St. Catharines, Ontario, save and except dispatchers and foremen and those above the rank of dispatcher and foreman, all office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (27 employees in the unit).

**1714-76-R:** Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 124 Ottawa-Hull (Applicant) v. Lawrence Contracting (Respondent).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons the rank of non-working foreman." (2 employees in the unit). *(clarity note – see Report of full decision [1977] OLRB Rep. January).* 1715-76-R: The Carpenters' District Council of Toronto and vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Jakob Keller Store Fixture installations (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquensing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**1717-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Argent Development Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquensing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1718-76-R:** Service Employees Union Local 268 Affiliated with the SEIU of A.F. of L., C.I.O., C.L.C. (Applicant) v. The General Hospital of Port Arthur (Respondent) v. International Union of Operating Engineers Local 865 (Intervener).

Unit: "all employees of The General Hospital of Port Arthur in the City of Thunder Bay regularly employed for less than twenty-five (25) hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, foremen and foreladies, persons above the rank of foreman and forelady, office and clerical staff, students employed during school vacation periods or on a co-operative work-study programme and persons covered by subsisting collective agreements." (28 employees in the unit). (*Having regard to the agreement of the parties*).

**1722-76-R:** Christian Labour Association of Canada (Applicant) v. Shar-Dee Contracting Limited (Respondent).

Unit: "all carpenters, carpenters' apprentices, construction labourers and all employees of the respondent in the Counties of Brant and Norfolk engaged in the operating of cranes, shovels, bulldozers and similar equipment, and those ordinarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

**1728-76-R:** United Brotherhood of Carpenters & Joiners of America (Applicant) v. Gaiser Builders Ltd. (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

**1730-76-R:** Laborers' International Union of North America, Local 493 (Applicant) v. Municipality of Casimir, Jennings & Appleby (Respondent).

Unit: "all employees of the Respondent working within the Townships of Casimir, Jennings and Appleby, save and except non-working foreman and office staff." (7 employees in the unit).

**1747-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Collavino Bros. Const. Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

### Applications Certified Subsequent to Pre-Hearing Vote

**1377-76-R:** United Steelworkers of America (Applicant) v. Kodak Canada Ltd. (Respondent) v. Local 159, International Chemical Workers Union (Intervener).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto and in the City of Brampton save and except foremen, persons above the rank of foreman, cafeteria employees, office staff, factory clerical staff, technical staff, marketing staff, persons employed in the "Film Emulsion Research' Development and Formulae Department" and in the "Paper Emulsion Research, Development and Formulae Department", chemical laboratory staff, security guards, employees at the respondent's facilities in Don Mills, Ontario, the Customer Equipment Service Division, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (1214 employees in the unit).

Number of names of persons on revised voters' list		1170
Number of persons who cast ballots		1083
Number of spoiled ballots	9	
Number of ballots marked in favour of applicant	733	
Number of ballots marked in favour of intervener	341	

**1432-76-R:** Canadian Chemical Workers Union (Applicant) v. Cyanamid of Canada Limited, Welland Plant (Respondent) v. International Chemical Workers Union Local 165 by its Trustee, Dennis Phillips (Intervener).

Unit: "all employees of the respondent at its Welland Plant, save and except foremen, persons above the rank of foreman, security staff, fire and safety division, station operators, professional and technical staff, office staff and salaried plant clerical staff." (430 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		427
Number of persons who cast ballots		312
Number of ballots marked in favour of applicant	300	
Number of ballots marked in favour of intervener	12	

**1522-76-R:** International Woodworkers of America (Applicant) v. Don Valley Lumber Company, A Division of Solmill Building Supplies Limited (Respondent).

Unit: "all employees of Don Valley Lumber Company, Township of Vaughan, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (27 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		25
Number of persons who cast ballots		25
Number of spoiled ballots	1	
Number of ballots marked in favour of application	16	
Number of ballots marked against applicant	8	



**1545-76-R:** Canadian Chemical Workers Union (Applicant) v. Glidden Company Division of SCM (Canada) Limited (Respondent) v. International Chemical Workers Union (Intervener).

Unit: "all Production and maintenance employees at the plant facilities covered, but shall not include Foremen, Chemists, Laboratory Technicians and Assistants, Office Employees or Operating Engineers." (135 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		135
Number of persons who cast ballots	114	
Number of ballots marked in favour of applicant	111	
Number of ballots marked in favour of intervener	3	

**1559-76-R:** Canadian Chemical Workers Union (Applicant) v. Canadian Rexall Corporation (Respondent) v. Local 279, International Chemical Workers Union (Intervener).

Unit: "all of the employees of the respondent in its plant located at Mississauga, Ontario, save and except office staff, assistant foremen and assistant foreladies and those above the rank of assistant foreman and assistant forelady and pharmacists and chemists." (119 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		98
Number of persons who cast ballots	79	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	63	
Number of ballots marked in favour of intervener	15	

### Applications Certified Subsequent to Post-Hearing vote

**0302-76-R:** The Hotel and Club Employees' Union, Local 299, Toronto, Ontario, affiliated with the Hotel and Restaurant Employees' and Bartenders International Union (Applicant) v. Holiday Inn Yorkdale - Commonwealth Holiday Inns of Canada (Respondent).

Unit: "all employees of the respondent at the Holiday Inn of Yorkdale of the Commonwealth Holiday Inns of Canada Limited, 3450 Dufferin Street, Toronto, Ontario save and except supervisors, persons above the rank of supervisor, sales and accounting staff secretaries, security staff, employees regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (147 employees in the unit).

Number of names of persons on revised voters' list		66
Number of persons who cast ballots	62	
Ballots of segregated and not counted	3	
Number of ballots marked in favour of applicant	32	
Number of ballots marked against applicant	27	

**1504-76-R:** Canadian Union of Operating Engineers (Applicant) v. A.E. LePage Limited (Respondent).

Unit: "all employees of the respondent at 350 Bloor Street East in Metropolitan Toronto, save and except building superintendents and persons above the rank of building superintendent." (6 employees in the unit).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots		6
Number of ballots marked in favour of applicant	4	
Number of ballots marked against applicant	2	

**1592-76-R:** United Plant Guard Workers of America Local 1962 (Applicant) v. Greater York Property Management Limited (Respondent).

Unit #2: "all security guards regularly employed for not more than twenty-four hours per week by the respondent at 900 Dufferin Street (Dufferin Mall), Municipality of Metropolitan Toronto, save and except assistant supervisor and persons above the rank of assistant supervisor." (5 employees in the unit).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots		3
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	1	

*(Bargaining Unit #1 – See Bargaining Units Certified – No Vote Conducted).*

## APPLICATIONS FOR CERTIFICATION DISMISSED

### No vote Conducted

**1339-76-R** Sheet Metal Workers' International Association Local Union #540 (Applicant) v. Kraemer Tool & Mfg. Company Ltd. (Respondent). (8 employees).

**1459-76-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 1747, 1304, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. XDG Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

**1604-76-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. The Dr. George A. Morgan United Auto Workers Dental Centre (Respondent). (14 employees).

**1659-76-R:** Labourers' International Union of North America, Local 527 (Applicant) v. D. L. MacDonald Construction Limited (Respondent). (8 employees).

**1661-76-R:** Laborers' International Union of North America, Local 493 (Applicant) v. Municipality of Casimir, Jennings & Applyby (Respondent). (7 employees).

**1676-76-R:** Group of Employees named on Schedule "A" attached hereto (Applicant) v. International Molders & Allied Workers Union (Respondent). (43 employees).

**1708-76-R:** Lake Ontario District Council, on behalf of Locals 397, 572, 1071, 1450 of The United Brotherhood of Carpenters and Joiners of America (Applicant) v. Normand and Fleming Limited (Respondent). (2 employees).

**1727-76-R:** International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Paragon Drywall Systems (Respondent). (21 employees).

### **Certification Dismissed Subsequent to Pre-Hearing Vote**

**1286-76-R:** International Union of Electrical Radio and Machine Workers (Applicant) v. Winchester-Western (Canada) Limited (Respondent).

Voting Constituency: "All office, technical and engineering employees of the respondent at its Cobourg Plant on Brook Road, save and except supervisors, those above the rank of supervisor, professional engineers, all those employees covered by a subsisting Ontario Labour Relations Board certificate issued to the International Association of Machinists and Aerospace Workers and its Local 788 and all those employees who work regularly for not more than twenty-four (24) hours per week." (67 employees).

Number of names of persons on revised voters' list		45
Number of persons who cast ballots	44	
Number of spoiled ballots	1	
Ballots segregated and not counted	3	
Number of ballots marked in favour of applicant	14	
Number of ballots marked against applicant	27	

**1452-76-R:** Ontario Public Service Employees Union (Applicant) v. Oaklands Regional Centre (Respondent).

Voting Constituency: "All employees of the respondent employed at Oaklands Regional Centre in Oakville, Ontario, save and except the Executive Administrator, Secretary to the Executive Administrator, Assistant Executive Administrator, Operations Manager, Finance Manager, Assistant Personnel Manager, Manager-Adult Services, Supervisor-Children's Residences, House Supervisors, Recreation Supervisor Developmental Day Care Supervisor and students employed in the school vacation period." (172 employees).

Number of names of persons on revised voters' list		187
Number of persons who cast ballots	151	
Ballots segregated and not counted	11	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	28	
Number of ballots marked against applicant	109	

**1454-76-R:** Brewery, Soft Drink, Distillery Distributors and Miscellaneous Workers Local 1000 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Brockley Fine Foods Inc. (Respondent).

Voting Constituency: "All employees of the respondent in its Commissary Division in Hamilton, Ontario, save and except foremen and forelady, persons above the rank of foreman and forelady, office



and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week." (38 employees).

Number of names of persons on revised voters' list		28
Number of persons who cast ballots	23	
Number of segregated ballots cast by persons whose name appear on voters' list	2	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	18	

**1502-76-R:** Canadian Paperworkers Union (Applicant) v. Kleen-Stik Products Limited (Respondent) v. International Chemical Workers Union, Local 424 (Intervener).

Voting Constituency: "All employees of the Company at Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (79 employees).

Number of names of persons on revised voters' list		80
Number of persons who cast ballots	76	
Ballots segregated and not counted	0	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	34	
Number of ballots marked in favour of intervener	39	

**1551-76-R:** Canadian Union of Public Employees (Applicant) v. The Sault Ste. Marie Public Library Board (Respondent).

Voting Constituency: "All employees of the respondent regularly employed for not more than 24 hours per week in the City of Sault Ste. Marie, in the District of Algoma, save and except bookkeeper and students employed during the school vacation period." (48 employees).

Number of names of persons on revised voters' list		47
Number of persons who cast ballots	41	
Number of ballots marked in favour of applicant	14	
Number of ballots marked against applicant	27	

**1606-76-R:** International Woodworkers of America (Applicant) v. Prowler Industries of Ontario Ltd. (Respondent).

Voting Constituency: "All employees of the Company at Lindsay, Ontario, save and except foremen and persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (115 employees).

Number of names of persons on revised voters' list		111
Number of persons who cast ballots	112	
Ballots segregated and not counted	2	
Number of ballots marked in favour of applicant	49	
Number of ballots marked against applicant	61	

### Certification Dismissed Subsequent to Post-Hearing vote

**1199-75-R:** Toronto Newspaper Guild, Local 87, The Newspaper Guild (Applicant) v. The Globe & Mail Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all district sales representatives employed by the respondent in its circulation department in the Province of Ontario, save and except branch managers and persons above the rank of branch manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period and employees presently covered by subsisting collective agreements." (67 employees in the unit).

Number of names of persons on revised voters' list		56
Number of persons who cast ballots	48	
Number of ballots marked in favour of applicant	19	
Number of ballots marked against applicant	29	

**1036-76-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the Borough of Etobicoke (Respondent).

Unit: "all employees of the Corporation of the Borough of Etobicoke employed in the Recreation Section of the Parks and Recreation Services Department classified as locker room attendants, cashiers, janitors, life-guards and instructors who are regularly employed for not more than 24 hours per week, save and except assistant supervisors, supervisors, and persons above the rank of supervisors, and those covered by the subsisting collective agreement between the respondent and Local 185 of CUPE." (28 employees in the unit).

Number of names of persons on revised voters' list		158
Number of persons who cast ballots	109	
Ballots segregated and not counted	2	
Number of ballots marked in favour of applicant	46	
Number of ballots marked against applicant	61	

**1110-76-R:** United Electrical Radio and Machine Workers of Amerlca (UE) (Applicant) v. Trent Metals Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent company in the City of Peterborough, save and except foremen, persons above the rank of foreman, office and sales staff and persons engaged as trainees under Canada Manpower Industrial Training Programme." (30 employees in the unit).

Number of names of persons on list as originally prepared by employer		33
Number of persons who cast ballots	30	
Number of ballots marked in favour of applicant	10	
Numner of ballots marked against applicant	20	

*(Bargaining Unit #2 – See Bargaining Units Certified – Vote Conducted).*

**1462-76-R:** Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Drummond, McCall & Co., Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working at Hamilton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, watchmen and security staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (40 employees in the unit).

Number of names of persons on list originally prepared by employer		37
Number of persons who cast ballots	37	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	7	
Number of ballots marked against applicant	29	

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**1475-76-R:** Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Acklands Limited (Unapco Division) (Respondent). (25 employees).

**1525-76-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of The United Brotherhood of Carpenters and Joiners of America (Applicant) v. Zorge Construction Company Limited, Mountclair Developments Limited (Respondent). (no employees).

**1567-76-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Espig Construction Co. Ltd. (Respondent). (3 employees).

**1610-76-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Beatrice Foods (Ontario) Limited Smiths Dairy Division (Respondent). (5 employees).

**1662-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. S. B. McLaughlin Associates Limited (Respondent). (6 employees).

**1689-76-R:** Warehousemen and Miscellaneous Drivers Local Union No. 419 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Consumers Distributing Comapany Limited (Respondent). (239 employees).

**1712-76-R:** Fuel, Bus Lemousine, Petroleum Drivers and Allied Employees Local 352, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Plasti-Glo Products Limited (Respondent). (20 employees).

**1757-76-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 1304, 2480 and 2482, United Brotherhood of Carpenters and Joiners of America (Applicant) v. E. S. Martin Construction Ltd. (Respondent). (2 employees).

**1782-76-R:** International Ladies Garment Workers' Union (Applicant) v. Maytex Limited (Respondent). (25 employees).

**1803-76-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. L. Laframboise (Respondent). (2 employees).

**1816-76-R:** Canadian Union of Public Employees (Applicant) v. Red Cross (Ottawa Branch) (Respondent). (11 employees).



## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1349-76-R:** George Fagents (Applicant) v. United Electrical, Radio and Machine Workers of America (UE) (Respondent) v. De Vilbiss (Canada) Limited (Intervener). (Granted).

Unit: "all employees of De Vilbiss (Canada) Limited at Barrie, save and except foremen, those above the rank of foreman, office and sales staff, students employed for school vacation period and persons regularly employed for not more than twenty-four hours per week." (109 employees in the unit).

Number of names of persons on list as originally prepared by employer		107
Number of persons who cast ballots		105
Number of spoiled ballots	1	
Number of ballots marked in favour of respondent	40	
Number of ballots marked against respondent	64	

**1409-76-R:** Sandra McKay, Brenda Maynard and Cheryl Manynard (Applicants) v. The Retail, Wholesale, Hotel & Restaurant Employees' Union, Local 448, A.F.L., C.I.O., C.L.C., chartered by the International Retail, Wholesale and Department Store Union, A.F. of L., C.I.O., C.L.C. (Respondent) v. Holiday Inn of Chatham of the Commonwealth Holiday Inns of Canada Limited (Intervener).

- and -

**1410-76-R:** Janet McIntyre, Edna McFadden, Jennifer Cobb and Raymond Higginbottom (Applicants) v. The Retail, Wholesale, Hotel & Restaurant Employees' Union Local 448, A.F.L., C.I.O., C.L.C., chartered by the International Retail, Wholesale and Department Store Union, A.F. of L., C.I.O., C.L.C. (Respondent) v. Holiday Inn of Chatham of the Commonwealth Holiday Inns of Canada Limited (Intervener). (Granted).

Unit: "all full time employees, part time employees and students employed during the school vacation period at the Holiday Inn of Chatham of the Commonwealth Holiday Inns of Canada Limited at 25 Keil Drive North, Chatham, Ontario, save and except the Innkeeper, Assistant Innkeeper, Catering Manager, Housekeeper, Maitre D', Chef, Sous Chef, Front Desk Manager, Secretary to the Innkeeper, Personnel Officer, Security Staff and Maintenance Supervisor. For the purposes of definition, part time employees shall be employees on call and those employees who are normally scheduled to work twenty-four (24) hours per week or less. Student employees shall be those employees in full time attendance at or on a recognized school break from an elementary or secondary school, a college or a university." (81 employees in the unit).

Number of names of persons on revised voters' list		55
Number of persons who cast ballots		43
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	42	

**1411-76-R:** Scott McNabb, on behalf of himself and other employees of Kodak Canada Ltd. (Applicant) v. International Chemical Workers Union, Local 424 (Respondent) v. Kodak Canada Ltd. (Intervener). (Granted).

Unit: "all employees of Kodak Canada Ltd. at its Don Mills Plant situated at Kern Road, in the Municipality of Metropolitan Toronto, save and except foremen, those above the rank of foreman, sales and office staff, students employed during the school vacation period, persons regularly employed for not more than twenty-four (24) hours per week and employees working for C.E.S.D." (13 employees in the unit).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	13	
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	12	

**1451-76-R:** James E. Myers (Applicant) v. The Canadian Union of Operating Engineers and their Local 103 (Respondent). (*Terminated*)

Unit: "all employees of Westinghouse Canada Limited at its Service Centre, 131 Cushman Road, St. Catharines, Ontario, save and except office staff, service manager, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, and students employed on a co-operative training program." (4 employees in the unit).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	4	

**1582-76-R:** John A McIntyre (Applicant) v. Retail Clerks International Association (Respondent). (12 employees). (*Granted*).

## APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

**1403-76-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers or America (U.A.W.) (Applicant) v. Standard Tube Canada Limited (Respondent). (*Granted*).

**1466-76-R:** Local 636 International Brotherhood of Electrical Workers (Applicant) v. The Stratford Public Utility Commission Transportation Department (Respondent). (*Granted*).

**1467-76-R:** Local 636 International Brotherhood of Electrical Workers (Applicant) v. The Stratford Public Utility Commission Hydro and Water Department (Respondent). (*Granted*).

**1507-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. Thorold Public Utilities Commission (Respondent). (*Granted*).

**1508-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. The Hydro-Electric Commission of Niagara Falls (Respondent). (*Granted*).

## APPLICATION FOR DECLARATION THAT LOCK-OUT UNLAWFUL

**1756-76-U:** The Lumber and Sawmill Workers' Union, Local 2995, of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Operation Forestieres (II) Limited, Real Mallette and Gerald Brousseau (Respondents). (*Withdrawn*).

## APPLICATIONS FOR CONSENT TO PROSECUTE

**1457-76-R:** The Canadian Union of Public Employees (Applicant) v. Regional Municipality of Halton (Respondent). (*Withdrawn*).

**1751-76-R:** Canadian Union of public Employees (Applicant) v. Corporation of the City of London (Respondent). (*Withdrawn*).

## COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

**0901-76-U:** Local 550, Canadian Food and Allied Workers Chartered by the Amalgamated Meat Cutters and Butcher Workmen (Complainant) v. Culverhouse Foods Incorporated (Respondent). (*Granted*).

**0980-76-U:** Labourers' International Union of North America, Local 183 (Complainant) v. Arsco Investments Limited and Joseph Rubin (Respondents). (*Terminated*).

**1011-76-U:** Canadian Workers Union (Complainant) v. Canon Ltd., Eastern Structural Division (Respondent). (*Dismissed*).

**1297-76-U:** Amalgamated Clothing and Textile Workers Union, AFL, CIO, CLC (Complainant) v. Dylex Limited (Respondent). (*Withdrawn*).

**1331-76-U:** United Steelworkers of America (Complainant) v. Jutan International Limited (Respondent). (*Withdrawn*).

**1356-76-U:** United Steelworkers of America (Complainant) v. Jutan International Limited (Respondent). (*Withdrawn*).

**1415-76-U:** Stephen T. Wills (Complainant) v. Seneca College of Applied Arts and Technology (Respondent). (*Dismissed*).

**1416-76-U:** Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Niagara Employment Agency (Respondent). (*Withdrawn*).

**1461-76-U:** Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters; Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Milnes Fuel Oil Limited and Ultramar Ontario Limited and John Milnes (Respondents). (*Granted*).

**1546 76-U:** Office & Professional Employees International Union, Local 81 (Complainant) v. Canadian Car Division Hawker Siddeley Canada Ltd. (Respondent). (*Withdrawn*).

**1560-76-U:** John Crockett (Complainant) v. The North York Civic Employees Union Local 94 Canadian Union of Public Employees (Respondent). (*Withdrawn*).



**1618-76-R:** International Woodworkers of America (Complainant) v. Don Valley Lumber Company, a division of salmill Building Supplies Limited (Respondent). *(Withdrawn)*.

**1654-76-U:** John Vendittelli (Complainant) v. Port Weller Dry Docks Limited International Brotherhood of Boilermakers Ironship Builders Blacksmiths, Forgers and Helpers Local 680 (Respondent). *(Withdrawn)*.

**1663-76-U:** Robert Wesley Archibald (Complainant) v. Hill Refrigeration (Respondent). *(Withdrawn)*.

**1669-76-U;** Ontario Nurses' Association (Complainant) v. Hillcrest Hospital (Respondent). *(Withdrawn)*.

**1693-76-U:** Maria Arcanjo (Complainant) v. Amalgamated Clothing Workers of America (Respondent). *(Withdrawn)*.

**1702-76-U:** Canadian Workers Union (Complainant) v. Canron Limited, Eastern Structural Division (Respondent). *(Dismissed)*.

**1713-76-U:** United Cement Lime & Gypsum Workers International Union (Complainant) v. Ontario Pallet Ltd. (Respondent). *(Withdrawn)*.

**1732-76-U:** Teamsters Union Local 879, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Sam Adelstein Scrap Iron & Metal Limited (Respondent). *(Withdrawn)*.

**1740-76-U:** Fuel, Bus Limousine, Petroleum Drivers and Allied Employees of Ontario, Local 352; Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Plasti-Glo Products Limited (Respondent). *(Withdrawn)*.

**1755-76-U:** The Lumber and Sawmill Workers' Union, Local 2995, of the United Brotherhood of Carpenters and Joiners of America (Complainant) v. Operation Forestieres (II) Limited, Real Mallette And Gerald Brousseau (Respondents). *(Withdrawn)*.

**1778-76-U:** International Union of Electrical, Radio and Machine Workers, AFL, (IO, CLC (Complainant) v. Canadian General Electric Company Limited (Respondent). *(Withdrawn)*.

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**1570-76-M:** International Union, United Automobile; Aerospace and Agricultural Implement Workers of America U.A.W. and its Local 569 U.A.W., C.L.C. (Trade Union) v. Sealed Power Corporation of Canada Limited (Employer). *(Granted)*.

**1688-76-M:** Uniroyal Ltd., Lindsay Plants, Textile Division (Employer) v. The United Rubber, Cork, Linoleum and Plastic Workers of America Local Union No. 795 (Trade Union). (*Granted*).

## APPLICATIONS UNDER SECTION 55

**1255-76-R:** Christian Labour Association of Canada (Applicant) v. Chateau Gardens (London) Inc. (Respondent) v. London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Intervener). (*Granted*).

- and -

**1329-76-R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O. C.L.C. (Applicant) v. Chateau Gardens (London) Inc. (Respondent) v. Christian Labour Association of Canada (Intervener). (*Granted*).

**1491-76-R:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. East-town Electric Company Limited (Respondent). (*Withdrawn*).

**1620-76-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Secondary Electrical Contractors Company (Respondent) v. Primary Electric Company Limited (Intervener). (*Withdrawn*).

**1678-76-R:** The Sheet Metal Workers' International Association, Local Union 562 (Applicant) v. N.W. Clayton Co. Limited and 298261 Ontario Limited carrying on business as Thompson Sheet Metal (Respondent). (*Terminated*).

## JURISDICTIONAL DISPUTE

**1341-76-JD:** International Brotherhood of Electrical Workers, Local 1687 (Complainant) v. The Sudbury Board of Education, Canadian Union of Public Employees, Local 895, Acme-Lansdowne Joint ventures and Regional Municipality of Sudbury (Respondent). (*Withdrawn*).

## APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

**1244-76-M:** Middlesex-London District Health Unit (Applicant) v. Canadian Union of Public Employees and its Local 101 (Respondent). (*Granted*).

**1399-76-M:** Canadian Union of Public Employees and its Local No. 3 (Applicant) v. Sault Ste. Marie Utilities Commission Office Workers Section (Respondent). (*Granted*).

## REFERENCE TO BOARD PURSUANT TO SECTION 96

**1637-76-M:** Welland Chemical Limited (Employer) v. Oil; Chemical and Atomic Workers International Union, Local 9-14 (Trade Union).

## APPLICATIONS UNDER SECTION 112A

**1601-76-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Carftsmen (Applicant) v. the Masonry Industry Employers' Council of Ontario and Reinhardt Masonry Limited (Respondent). (*Granted*).

**1616-76-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Val-Ros Construction Limited (Respondent). (*Withdrawn*).

**1631-76-M:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Kroman's Electric Limited and Adolf Kroman (Respondent). (*Withdrawn*).

**1632-76-M:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. J.A.K. Electric Contractor Limited (Respondent). (*Withdrawn*).

**1642-76-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Babcock & Wilcox Canada Ltd. (Respondent). (*Withdrawn*).

**1667-76-M:** The Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Petrisan Construction Ltd. (Member Company of Toronto & District Excavators Association) (Respondent). (*Withdrawn*).

**1670-76-M:** The Teamsters Local Union No. 230, Ready Mix, Building Supply Hydro & Construction Drivers, Warehousemen and Helpers, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Petrisan Construction Ltd. (Member Company of Toronto & District Excavators Association) (Respondent). (*Withdrawn*).

**1683-76-M:** A Council Of Trade Unions, acting as representative and agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local 183 (Applicant) v. The Metropolitan Toronto Sewer & Watermain Contractors' Association (Respondent). (*Withdrawn*).

**1697-76-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Crestwood Construction Inc. (Respondent). (*Withdrawn*).

**1704-76-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 (Applicant) v. L. Pupolin Plumbing & Heating Co. Ltd., The Metropolitan Plumbing and Heating Contractors Association, The Mechanical Contractors of Toronto (Respondents). (*Withdrawn*).

**1705-76-M:** Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No 598 (Applicant) v. Life Construction Ltd. (Respondent). (*Withdrawn*).



**1719-76-M:** Labourers' International Union of North America, Local 183 (Applicant) v. C.A.L.S. Construction Ltd. (Respondent). (*Withdrawn*).

**1721-76-M:** The Sheet Metal Workers' International Association; Local Union 562 (Applicant) v. N.W. Clayton Co. Limited, 298261 Ontario Limited carrying on business as Thompson Sheet Metal and the Waterloo-Wellington Sheet Metal Contractors Association (Respondent). (*Terminated*).

**1731-76-M:** Labourers' International Union of North America, Local 527 (Applicant) v. Durie Mosaic & Marble Limited Ottawa Construction Association (Respondents). (*Withdrawn*).

**1741-76-M:** International Union of Operating Engineers Local 793 (Applicant) v. Penvidic Contracting Ltd. (Respondent). (*Withdrawn*)

**1744-76-M:** Local Union 494, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Delta Construction (Windsor) Limited and Omega Contractors (Windsor) Limited (Respondent). (*Withdrawn*).

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**0945-76-R:** Teamsters' Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Don Anderson Haulage Limited (Respondent) v. Group of Employees (Objectors). (*Request Denied*).

**0984-76-U:** Ralph Milrod Metal Products Limited (Applicant) v. See Appendix "A" Attached (Respondents). (*Section 82*) (*Request Denied*).

**0992-76-M:** International Union of Elevator Constructors, Local 90 (Applicant) v. Canadian Elevator Manufacturers' Association, more particularly, Otis Elevator Company Limited (Respondent).  
- and -

**0993-76-M:** International Union of Elevator Constructors, Local 90 (Applicant) v. Canadian Elevator Manufacturers Association and more Particularly, Dover Corporation (Canada) Limited (Respondent).  
- and -

**1023-76-M:** International Union of Elevator Constructors, Local 90 (Applicant) v. Canadian Elevator Manufacturers' Association (Respondent). (*Section 112a*). (*Request Denied*).



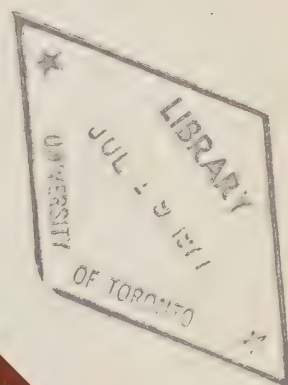
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**0923-76-M** The Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local Union 124 Ottawa-Hull and Rocco Romeo, [Applicants], v. Mount Royal Concrete Floor [Canada] Ltd. and The Ottawa Construction Association, [Respondents].

**Arbitration – Section 112a – Whether discharge without just cause – whether employer conduct a breach of notice and work scheduling provisions of agreement.**

**BEFORE:** A. L. Haladner, Vice-Chairman, and Board Members D. B. Archer and J. E. C. Robinson, Q.C.

**APPEARANCES:** *Denis J. Power and Jean-Guy Denis for the applicants; John Cardill and Ugo Panetta for the respondents.*

**DECISION OF THE BOARD:** March 15, 1977

1. The name “Mount Royal Concrete Floor [Canada] Limited” appearing in the style of cause of this application as the name of one of the respondents is amended to read: “Mount Royal Concrete Floor [Canada] Ltd.”.

2. This is an arbitration pursuant to section 112[a] of The Labour Relations Act. The applicant, Plasterers' Local Union 124 [the “Union”] has alleged an unlawful dismissal as well as violations of three separate provisions of the collective agreement between the union and Mount Royal Concrete Floor [Canada] Ltd. [the “Employer”]. The following relief is claimed. As regards the alleged unlawful dismissal, the union is seeking reinstatement together with compensation for lost wages and other benefits. The union is not at this time making any financial claims with respect to the other contract violations of which it complains. The union is seeking declarations that there have been violations, together with orders directing the employer to comply with the three provisions in question.

3. The alleged unlawful dismissal can be disposed of quickly. At the conclusion of the union's evidence in chief, the Board advised counsel that it would neither order the reinstatement of the grievor, Rocco Romeo, nor make an order for compensation and that, accordingly, there would be little value in hearing more evidence regarding Mr. Romeo's termination. The reason for that ruling was that the evidence of the union, which the Board heard first by agreement of counsel, established to the satisfaction of the Board that the grievor had no intention, at the time of his termination, and no intention thereafter, of remaining in the employer's employ.

4. Counsel for the union objected to the dismissal of the grievance at such an early juncture in the proceedings, no doubt in part on the ground that the Board did not make any definitive ruling as to whether the grievor had voluntarily quit or whether he had been discharged by the employer. It was unnecessary for us then, and it is unnecessary for us now, to make any conclusive determination on this point. The circumstances surrounding the grievor's termination, as portrayed by the grievor and the other union witnesses, make it difficult to characterize the grievor's termination as either a quit or a discharge in that both the employer and the grievor spoke words and took actions which were consistent with an intention to sever the employment relationship. But whether the employment relationship

was severed at the instance of the grievor or the employer, it was clear to the Board that the grievor intended to bring that relationship to an end one way or another. In short, the evidence establishes that if the grievor did not quit, he actively sought his dismissal. In these circumstances, Mr. Romeo's grievance cannot succeed.

5. The union has alleged a violation of Article XI E] of the collective agreement. That provision provides as follows:

The Employer also agrees that he will notify employees of his requirements either the evening before or not later than 10:00 a.m. in the day if the employee is required for work, the Employer will not alter the starting time, save and except that the job has been entirely cancelled.

6. The evidence establishes that there is an informal arrangement in effect between the employer and some of its employees whereby the particular employee concerned, or more often his wife, will telephone the employer in the morning to ascertain whether the employee is required to work that day. The employee or his wife is informed at that time whether the employee's services will be required, and if so, where, and also that he will be called when the employer needs him. The employee is later called and told what time to report for work. The evidence establishes that the employees were almost always notified by 10:00 a.m. whether they would be working that day but they were often not told the exact starting time until an hour before they were scheduled to report, which was often a number of hours after 10:00 a.m.

7. The Board was informed that this informal arrangement had been introduced at the request of the employees and also that it was designed to allow those employees who had worked late the night before, as is often the case in the concrete construction industry, to sleep in past 10:00 a.m. on those mornings when they would not be required for work or would not be required until later in the day. The Board was further informed that the arrangement had been made necessary by the difficulties inherent in the industry in establishing, in advance, an exact starting time for a concrete pour, the main problem being that the employer is dependent upon the general contractor for material and is not always given sufficient advance notice of the time at which the concrete will be arriving at the job site.

8. The question of whether this informal arrangement is in violation of the collective agreement turns on the meaning to be attributed to the word "requirements" in Article XI E]; for whatever be these requirements, it is clear from a reading of the section that the employee must be notified of same by 10 o'clock in the morning of the day upon which he is required for work. Counsel for the employer maintained that by advising the employees that they would be working by 10:00 a.m. even though the exact starting time was not then established, the employer had complied with the collective agreement. In short, the position of the employer was that the word "requirements" in Article XI E] did not include the starting time for the day. Were it not for the concluding language of that Article, "the Employer will not alter the starting time, save and except that the job has been entirely cancelled", this argument of the employer might have some merit [in that the section would be unclear, at least on its face]. However, as counsel for the union pointed out, this language, which prohibits the employer from altering the starting time save in the one circumstance there provided, makes it clear that the intention of the parties was to require the employer to notify the employee by 10:00 a.m. not only whether he would be working that day, but also when



he would be required to report for work. In our view, this interpretation is not only required by the explicit language of Article XI E], it is also the interpretation which is most in keeping with the purpose of the Article, which is to shift the burden of uncertainty to the employer after 10:00 a.m. The Board was advised that before the introduction of Article XI E], the cement mason was at the disposal of the employer throughout the day and that this was the evil the provision had been intended to remedy.

9. Counsel for the employer placed stress on the fact that the employer's practice in respect of Article XI E] had been not only agreed to, but requested by the employees. In our opinion, that is completely without relevance to the question of whether the Article has been complied with. It is trite law that an employer who is a party to a collective agreement with a union does not have the right to negotiate privately with its employees over terms and conditions of employment. Section 35[1] of The Labour Relations Act states that: 35.-[1] Every collective agreement shall be deemed to provide that the trade union that is a party thereto is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein.

Article V of the collective agreement recognizes the union "as the exclusive bargaining agent of all Cement Masons; foremen, journeymen, apprentices and helpers in cement finishing work on all concrete construction".

10. It is readily understandable, in light of the late night work habits of some of the cement masons in the Ottawa area [see *supra*], why this group of employees would wish to secure an agreement from the employer which was slightly at variance with the terms of the collective agreement. However, these employees are not themselves free to obtain such an agreement or to waive their right to notice of the employer's requirements under Article XI E], both as to work and time of work, by 10:00 a.m. If the employees wish to vary or alter a provision of the collective agreement which they perceive as inadequate, as it is presently worded, to fully accommodate their interests, the appropriate method for effecting such a change is for the employees to have their union negotiate with the employer to make the necessary alteration.

11. We therefore hold that Article XI E] has been violated and that the informal arrangement between the employer and the employees cannot override the strict requirements of that Article. The employer is directed to comply with Article XI E].

12. The union also alleged a violation of Article XXIII C]:

The Employer shall endeavour to alternate crews weekly especially on screeding, when feasible.

13. The Board was informed that the work of the cement mason comprises two kinds of tasks – screeding and finishing. Screeding is the process by which the concrete is levelled after it is poured. It is done in preparation for finishing which is, as the name suggests, the final phase of the concrete construction. Each of these two jobs has its own distinctive advantages and disadvantages. Screeding is a more difficult job from a physical standpoint in that it involves bending over and pulling at the cement with a two-by-four. Finishing, although less demanding physically, requires a greater degree of technical skill in that it is done for the most part by machine. Because it is done first, screeding is basically a day job.

Finishing, because it cannot take place until after the concrete is screeded, involves a great deal of evening and night work. Apparently, it is not uncommon for a cement finisher in the Ottawa area to remain on the job until the early hours of the morning. In contrast to screeding, cement finishing thus provides the employee with an opportunity for substantial overtime work.

14. It was agreed that Article XXIII C] was drafted with a two-fold objective in mind. It was designed to give the employees an opportunity to alternate between screeding and finishing and thus to take advantage of the benefits which each job offers. As well, the Article was intended to afford apprentice cement masons an opportunity to learn both facets of the trade. To be a member of that trade, one must be capable of both screeding and finishing.

15. The evidence clearly establishes that the employer did not alternate its employees between screeding and finishing as did other employers in the Ottawa area. [It should be noted here that the Board has accepted the agreement of the parties that "crews" in Article XXIII C] means "individuals". The evidence was that although no employer in the area alternated "crews" per se, individual employees who wished to alternate were permitted to do so, the majority preferring to work exclusively on either screeding or finishing.] The reason for the employer's failure in this regard, however, is not so clear. Apart from the evidence of one Armando Jardim, a former employee, there was no evidence before the Board of a failure on the part of the employer to alternate after having been specifically requested by an employee to do so. As for Mr. Jardim's evidence, it was equivocal at best. Although he told the Board that he had not been given an opportunity to learn cement finishing while in the employ of the employer, he acknowledged under cross-examination that he had been offered finishing work by the employer which he had refused, and also that it was his fellow workers who had prevented him from doing finishing work and not the employer. In the latter connection, the Board heard evidence from another employee that Mr. Jardim was afraid of the finishing machine and could not operate it properly.

16. Counsel for the employer contended that Article XXIII C] does not require the employer to alternate employees unless it is "feasible", and that it is not feasible for the employer to alternate employees who have no wish to alternate. We would agree with this proposition in principle – Article XXIII C] was not, in our view, intended to require the employer to alternate employees against their will. However, if the employer were to encourage or acquiesce in a situation where apprentice cement masons were effectively prevented from learning finishing work, that would be tantamount to a refusal to alternate.

17. Because the evidence in respect to the employer's conduct falls short of establishing a breach of Article XXIII C], we decline to issue an order for compliance. However, the employer should be aware that a failure to alternate in the future may give rise to liability. In order to ensure compliance with Article XXIII C], it is suggested that the employer make it clear to its employees that the collective agreement allows for alternation and that it will endeavour to comply with all employee requests for alternation when feasible. It is obviously neither desirable nor possible for the Board to lay down any exhaustive list of situations when it would not be "feasible" for an employer to alternate employees. But it would be our opinion, having regard to the purpose of Article XXIII C] which is, in part, to ensure that all the members of the union employed by the employer receive proper training in both facets of the trade, that the mere inability of an apprentice cement mason to immediately



master the operation of the cement finishing machine would not render alternation unfeasible. That is not, of course, to suggest that the employer would be required to alternate an employee who had been given a reasonable opportunity to learn cement finishing and remained unable to perform the task properly.

18. The last violation of the collective agreement alleged by the union is in respect of Article XXIII L]:

The Employer agrees to schedule a sufficient number of Cement Masons on the screeding and finishing of concrete pours to ensure that the product can be completed in a satisfactory and workmanlike manner.

19. The Board heard evidence from a number of union witnesses as to the number of square feet of concrete that a cement mason could reasonably be expected to screed under normal conditions in a regular shift. Counsel attempted to have the Board draw from this evidence the conclusion that the employer had violated Article XXIII L] in that the amount of screeding required by the employer's employees was often well in excess of the proposed average.

20. There are a number of difficulties inherent in this approach to the question of whether Article XXIII L] has been violated. First of all, while it may be possible to give an average square foot figure for screeding per day, quite frankly, we have considerable doubt as to the practical value of such a figure. The Board heard evidence from the President of Duron Ottawa Limited, a company involved in basically the same work as the employer, that it is not possible to determine, in the abstract, the amount of concrete that a cement mason can screed in a given period of time. This is because there are too many variables which affect the rate of set or hardness of the concrete. Among the variables which determine the amount of concrete that a cement mason can screed are the weather [ temperature, wind, humidity, etc.], the thickness of the concrete, the type of finish, the skill of the individuals involved, and the geography of the area to be screeded. If this evidence is accepted, and we believe that it must be, it is apparent that the question of whether there has been a violation of Article XXIII L] can only be determined by reference to the specific facts of a particular concrete pour, facts which we would emphasize were not before us in respect of any of the pours of the employer. As counsel for the employer put it, the union would have us find a violation of Article XXIII L] on the basis of general, rather than specific, evidence.

21. But there is a more fundamental problem with the proposed approach to the question of whether Article XXIII L] has been violated. Although located in the part of the collective agreement which deals with "Working Conditions", Article XXIII L] does not define the employer's obligation, in respect of scheduling, in terms of the quantity of work to be performed. It is rather defined in terms of the quality of the finished product. In order to establish a violation of the Article, it would appear necessary, therefore, to demonstrate that the product in a particular case had not been completed in a satisfactory and workmanlike manner. There was no evidence before us that any of the employer's projects were not completed in the required manner.

22. That notwithstanding, the Board did get the distinct impression that the employer's employees were often required to work at an unduly onerous pace in order to complete their work in a satisfactory and workmanlike manner, and thus allow the em-



ployer to comply with the terms of its collective agreement with the union. The evidence of the union witnesses, which was neither shaken on cross-examination nor rebutted by the evidence of the employer, was that the employer's practices with respect to the scheduling of employees on concrete pours did not correspond with the practices of the other concrete construction firms in the Ottawa area, and that, as a result, the employer had a problem keeping employees. Thus, while we cannot find the employer in violation of Article XXIII L], we can urge it to schedule so that the product can be completed without excessive effort on the part of the employees. In the long run, such an approach to the scheduling of employees can only be in the best interest of everyone concerned.

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**1564-76-U; 1565-76-U** The United Steelworkers of America, Local 4487, [Complainant], v. Inglis Limited, [Respondent].

**Section 79 – Duty to Bargain in Good Faith – Whether alleged employer misrepresentation concerning plant relocation constitutes bargaining in bad faith – Effect of employer discussions with individual employees concerning transfer to jobs outside unit – Whether unlawful interference with exclusive bargaining agency.**

**Practice – Procedure – Whether on Section 79 complaint board may make interim remedial orders – whether Board will order production of documents in possession of a witness.**

**BEFORE:** Kevin M. Burkett, Vice-Chairman and Board Members O. Hodges and N.B. Satterfield.

**APPEARANCES:** *Lennox A. MacLean, John Fitzpatrick, Syl MacNeil and Delena Sanger for the applicant; Michael Gordon and Tony Sutcliffe for the respondent.*

**DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER N.B. SATTERFIELD:** March 7, 1977

1. These are complaints filed under section 79 of the Act alleging violation of sections 14, 56, 58 and 59 of The Labour Relations Act. The Board hereby consolidates these two files.

2. During the course of the hearing certain oral rulings were made by the Board which counsel asked be reduced to writing. The complainant's case involves alleged violations of the Act in connection with the proposed move of part of the respondent's business from its Toronto location to new locations in Malton, Markham and Mississauga. By the time this matter came on for a hearing, this move was imminent, and accordingly at the commencement of these proceedings, the complainant asked that the Board issue a direction forbidding the respondent from making the move until the issues herein were finally determined. The complainant alleged that if the move took place, it would be gravely prejudiced. At the hearing the majority rejected the complainant's argument and declined to issue the order requested. Section 79 provides *inter alia*: "... and where the Board is satisfied that an employer, employer's organization, trade union, council of trade unions, person or employee, has acted contrary to this Act it shall determine what if anything the em-

ployer, employer's organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto ...”

It is apparent from the manner in which Section 79 is framed, that the Board's remedial authority is contingent upon a finding that there has been a contravention of the Act. There is no explicit power to issue interim orders of the kind which the complainant requested, nor was the complainant able to point to any authority allowing such orders, or any previous case in which one was issued. Section 81[8] of the Act explicitly contemplates that the Board may issue interim cease and desist directions in respect of jurisdictional disputes. Similarly, Section 6[1a] permits the Board to issue an interim certificate pending the final resolution of the composition of the bargaining unit. The legislature therefore has clearly turned its mind to the availability of interim relief; and in its wisdom has not included language in Section 79 which would permit the Board to issue an order of this nature. Even if the Board had this power – and in our view we do not – it would only be exercised in the clearest of cases where the complainant had made out a strong *prima facie* case and would suffer irreparable damage if interim relief were not given. The Board was satisfied in the instant case that the breadth of its remedial authority was sufficient to repair whatever damage might be occasioned by the absence of interim relief and accordingly the respondent was put on notice that it proceeded with the move at its peril.

3. During the course of cross-examination of the respondent's witnesses the applicant requested that the Board order the production of certain documents within the possession of the respondent. Although the complainant suggested that this evidence was crucial to its case, no attempt had been made to subpoena these documents, nor had the complainant subpoenaed any company officials who might be in a position to establish the facts by *viva voce* evidence. Certain provisions of the Act place an onus on the respondent to come forward with evidence which is material to the issue raised before the Board. [See, for example, sections 1[5] and 55[13] ]. In addition, the Board has the independent authority to subpoena persons as “Board witnesses” as, for example, when the Board must satisfy itself that the membership evidence is in order and it becomes aware of the possibility that an employee had not paid the amount required by the Act to establish his status as a “member” of the union [the “non-pay” situation]. Normally, however, the carriage of the proceedings is left to the parties. This Board is not prepared to play the role of inquisitor. A party failing to produce evidence relevant to the case risks an adverse inference being drawn against it in respect of the evidence not produced. A party requiring evidence for the carriage of its case is entitled and expected to subpoena it. Any defiance of a subpoena can be fully redressed in the courts. Accordingly, therefore, the Board declined to order the production of documents which were in respect of events known to the complainant well in advance of the hearing.

4. The charges before us arose out of a decision of the respondent company to relocate its National Parts and Toronto Service operation. On October 27, 1976 the company's Board of Directors approved of the move of these functions, which had been situate at the company's premises at 14 Strachan Avenue, to three separate locations outside the boundaries of Metropolitan Toronto and the subsequent use of the vacated space for the manufacture of laundry product and the construction of an employee cafeteria. The National Parts operation is to be located on Nashua Drive in Malton and the Toronto Service function is to be divided between an East branch located on Torbay Road in Markham and a West branch located on Ambler Road in Mississauga. The company will service its Toronto and



vicinity customers from these two locations rather than from Strachan Avenue as it has done in the past. The relocation will affect some twenty-five employees of the National Parts operation and thirty-employees of the Service operation who fall within the bargaining units represented by locals 2900 [production] and 4487 [office and technical] of the United Steelworkers of America. The total bargaining unit population of the two locals at 14 Strachan Avenue is approximately 1,000.

5. The essence of the union allegations can be set out as follows. *Firstly*, the union alleges that when it entered into the current collective agreement between the parties it did so upon the assurance of the company that it would not relocate its operation. The recognition clause in the current local 2900 agreement [production] recognizes the union as the sole collective bargaining agent for the employees of the company "in the Metropolitan Toronto area" with certain named exclusions not here material. In the Local 4487 [office and technical] agreement the union is recognized as the sole collective bargaining agent for the salaried employees of the respondent "at 14 Strachan Avenue, Toronto" with certain named exceptions not here material. These clauses were unchanged in the last round of bargaining between the parties which concluded in August of 1974 after a four month strike. The union had sought to extend the scope of its recognition by the replacement of the reference to 14 Strachan Avenue in the local 4487 agreement and its replacement by a reference to Metropolitan Toronto and the addition of a clause in both agreements requiring that should any of the then present operations be moved to a location outside of Metropolitan Toronto the agreement would be extended to cover such locations. It is the union's contention that these proposals were withdrawn by it on the assurance of the company that it would not move any of its operations during the term of the current collective agreement. The union alleges that the decision of the company to relocate the National Parts and Toronto Service functions in the face of these assurances constitutes a violation of Section 14 of the Act, the section of the Act setting out the duty to bargain in good faith.

6. The union alleges *secondly*, that the company by dealing directly with the employees and not through the recognized bargaining agent after the decision to relocate was approved on October 27 and by offering the affected employees individual contracts of employment and by seeking to entice the affected employees to repudiate their bargaining agent violated Sections 56, 58 and 59 of the Labour Relations Act.

7. The chief protagonists of the 1974 negotiations testified before the Board. Mr. H. Morris who retired as the company's Vice-President of Industrial Relations on December 31, 1974 testified that upon first studying the union's proposals he informed Mr. J. Adams the company's negotiator that the union's request for extended recognition was a strike issue. He referred to the company's position as "adamant" and "rigid". Mr. Morris testified that the effect of extending the union's recognition would create a jurisdictional problem with the U.A.W. if the company were to move part or all of its operation to Stoney Creek where the U.A.W. enjoys bargaining rights. Mr. Morris admitted that during the concluding stages of bargaining he told Mr. J. Fitzpatrick, the International Representative of the union charged with negotiating the agreement on the union side, that the company has no "plans" to move its operation. He stated, however, that it was common knowledge at that time that if the Spadina Expressway were built the Company would be forced to relocate and that if major contracts were received from the parent company expansion would be necessary. Mr. Fitzpatrick testified to the effect that he was "assured" by Mr. Morris that the Company would not relocate. Mr. Syl MacNeil, the president of local 2900 [production]



testified that at a bargaining meeting called to deal specifically with servicemen Mr. Morris assured the union that the company would not move for 10 years. He said that this assurance was given during the course of a discussion dealing with union proposal 46.02 which was a request that the areas then serviced by Service Technicians continue to be serviced exclusively by them. The thrust of this proposal appears to the Board to be directed at contracting out rather than relocation. Mr. Bruce Gilbert, the company's Vice-President of Manufacturing, who was present at the meeting referred to by Mr. MacNeil, testified that no such assurance was given. Mr. Gilbert revealed under cross-examination that he had refreshed his memory in respect of the meeting referred to by Mr. MacNeil by reading the notes of that meeting which were recorded by the company. The Board prefers the evidence of Mr. Gilbert in this regard.

8. The company adduced extensive evidence going to the emanation of the ultimate decision to relocate the National Parts and Toronto Service functions. Mr. Bruce Gilbert who became Vice-President of Manufacturing in November 1974, initiated a study in the Fall of 1975 in order to determine how best to manufacture the volume of product which a five year marketing plan, completed in September, 1975, indicated was needed to meet customer demand. The group assigned to the study presented a number of alternatives in March, 1976 which were in turn placed before the Industrial Engineering Department for evaluation. Concurrently the company decided to withdraw from the Water Heater portion of its business in February of 1976. In June of 1976 Mr. Gilbert, on the advice of the Industrial Engineering Department, concluded that the Strachan Avenue manufacturing facilities should be expanded to include the space vacated by the Water Heater operation and the space realized by the relocation of the Service and National Parts operation. The plan was put to the president in July and with certain modifications not here relevant, was put to the Board of Directors and approved on October 27, 1976. The managers of the departments affected were advised in July to search for alternate accommodation on a conditional basis and the evidence establishes that the search for alternate accommodation did not commence until this time. The company put into evidence the marketing and manufacturing feasibility studies referred to in the evidence and the minutes of the Board of Directors meeting at which the decision was taken to relocate. The company called the Vice-President of Manufacturing, the Vice-President of Consumer Services and the Chairman and Chief Operating Officer, all of whom were subject to extensive cross-examination. This Board is satisfied that the plan to relocate the National Parts and Toronto Service function was conceived on the basis of changing business conditions and information in respect thereof which became known to the company decision-makers in the period September, 1975 to March, 1976. Bargaining for the current collective agreement concluded in August, 1974.

9. The company, after carefully considering how best to inform the affected employees and the bargaining agent of its decision, called three separate meetings on November 17, 1976 at which simultaneous announcements were made. The bargaining unit personnel resident at 14 Strachan Avenue were called to a meeting at 14 Strachan Avenue, the executive of the union locals were called to separate meetings at 14 Strachan Avenue, and the service technicians were called to a meeting at the Yorkdale Holiday Inn. The bargaining unit employees resident at 14 Strachan Avenue [i.e. those affected other than the servicemen] were informed of the move and of the reasons underlying the company's decision. Mr. J. Hornibrook, the Manager of National Service Products and the company official who addressed this meeting, spoke from a prepared text from which reads in part:

"All of the new locations are outside the boundaries of Metropolitan Toronto and are therefore outside the jurisdiction of your present Collective Agreements. We will be transferring the work you now perform in the bargaining unit to the new locations and we are therefore required, by the Collective Agreements, to officially lay you off at 14 Strachan Avenue. You will be given your formal layoff notice by the end of this week. The effective date of your layoff will be February 4, 1977. [The date was inserted verbally during presentation.]"

Mr. Hornibrook told the employees that because the company was presently in the process of determining what jobs would be available in the new locations [it was the company's evidence there would be fewer jobs] and was unsure as to who would be willing to transfer it was unable to make definite job commitments. Rather, Mr. Hornibrook asked that anyone interested in a job at the new location notify the company by November 22. He advised the employees to assume that any new position would be similar in job content and salary to their existing position. He told the employees that the company would reply to those who were interested in transferring with either a definite job offer or a refusal. He went on to say:

"Those who are offered a position will have the choice of accepting it or staying within their present bargaining unit and exercising their seniority rights. Those that we are unable to offer a position to will also be able to exercise their seniority rights within their particular bargaining unit."

At the conclusion of Mr. Hornibrook's remarks Mr. Gene Herman, a personnel administrator of the company, spoke. He explained his presence by reference to the fact that the new locations were outside the jurisdiction of the existing collective agreements. He explained to those present that because their jobs within the existing bargaining unit were to disappear the company was required under the terms of the collective agreement to serve them with notice of lay-off. He testified that he explained how the lay-off system worked and informed the employees that if they were not offered or did not accept jobs at the new locations that their rights under the collective agreement were protected. These rights were referred to in the notice of lay-off letter given to each employee [Exhibit # 14].

10. Mr. N. Steward, the Vice-President Consumer Services and Mr. T. Sutcliffe, the Labour Relations Officer charged with administering the local 2900 and 4487 collective agreements, met with the executives of the two locals at the same time as Messrs. Hornibrook and Herman were meeting with the bargaining unit employees [other than the servicemen]. They met first with the local 2900 executive and immediately thereafter with the local 4487 executive. The respective local executives were informed of the decisions taken by the company and of the effect of these decisions vis-a-vis the existing bargaining unit. Neither the local unions nor the International had previously been given any information in respect of the company's consideration of the relocation alternative or the decision taken in respect of this alternative.

11. The service technicians, who are within the bargaining unit represented by local 2900, were called to a meeting at the Yorkdale Holiday Inn. They were informed of the company's decision and the reasons therefor. The concluding remarks of Mr. G. Alpin which were read from a prepared statement were as follows:



“All of the new locations are outside the boundaries of Metropolitan Toronto and are therefore outside the jurisdiction of your present Collective Agreement. We will be transferring you outside the bargaining unit to non-union positions and we are required, by the Collective Agreement, to officially lay you off at 14 Strachan Avenue.

At the end of this meeting, you will be given a personally addressed envelope which contains an official layoff notice, an offer of a job at one of the new locations, and a special issue of Strachan Talk.

You have the choice of accepting the new position, or being laid off at Strachan Avenue and exercising your seniority rights within Local 2900.

Now, at this time, I will turn the meeting over to Dave Tyson, who will explain our salary programme and benefits.”

Each of the servicemen were given the material referred to by Mr. Albin, including the notice of lay-off and the offer of a job at one of the new locations. Mr. David Tyson, the Manager of Salary Administration, explained to the servicemen at these meetings that those who accepted the job offers at the new locations would be covered by the “non-union compensation program” including the benefit package and salary administration plan. The company did an evaluation of the individual servicemen in the period prior to November 17 and set out for each serviceman in the job offer the date and amount of his next wage increase should he accept the job offer. The package of non-union benefits which was offered to the Servicemen was acknowledged as superior to those benefits enjoyed under the subsisting collective agreement. The evidence establishes that there are three compensation plans used within the respondent company, the plan covering the unionized employees, the plan covering senior management employees and the plan covering the other non-unionized employees of the company. This latter plan is referred to within the Company as the “non-union Employee Benefits Program.”

12. The company carefully prepared for the three meetings which were held on November 17. The minutes of the preparatory management meetings [Exhibit #31] reveal a conscious consideration by the company of the non-union status of the new locations. The Board refers to the following comments found in these minutes in support of its statement:

– “essential that a firm date for the move be established as soon as possible. The inability to fix the move could jeopardize the entire operation in relation to its union, non-union status.”

– “the delivery of information to the union must not be prejudiced by early disclosure of our plan details.”

– “in both Department 93.1 store moves local 2900 members will be used to the extent possible, but it was agreed that no 2900 member would leave the 14 Strachan Avenue premises while on the job, if they left they must not return. Such contamination, if allowed, could possibly jeopardize the non-union status at the new locations.”



– “it was decided that if a department had specific employees who were going to move that their lay-off effectiveness could be advanced and the employee could move to the new location as early as January 15 providing they do not return to Strachan Avenue.”

13. Subsequent to November 17 certain of the affected bargaining unit persons [other than servicemen] were offered jobs at the new locations. The offers to these persons were also on the basis of the company’s “non-union benefit program.” These employees and the servicemen were in effect given the option of exercising their seniority and bumping rights under the collective agreement *or* accepting employment at the new location.

14. Having reviewed the facts and the allegations it is clear that the issues raised in this case must be examined in light of the 1974 negotiations between the parties, out of which emerged the current collective agreement. If the evidence establishes that in 1974 the company violated section 14 of the Act [i.e. to bargain in good faith and make every reasonable effort to make a collective agreement] in such a manner as to achieve a collective agreement lacking certain union protections [i.e. extended recognition] which would otherwise have been included, the Board must exercise its remedial authority in respect of the Section 14 violation and, consequentially it must view the facts in respect of the section 56, 58 and 59 allegations in light of such a finding. If, on the other hand, the evidence does not establish a section 14 violation then the facts in respect of the other allegations must be viewed in light of the recognition clauses as set out in the subsisting collective agreements. It is these recognition clauses which would then set the parameters of the union’s rights vis-a-vis the collective agreement and which would in turn colour the facts in respect of the company’s conduct vis-a-vis the Labour Relations Act.

15. Counsel for the complainant argued that the duty set out in Section 14 of the Act is a continuing duty requiring the employer to negotiate the terms of a mid-contract relocation with the union. The Board rejects this argument. The duty stipulated in Section 14 is in respect of the duty to bargain for a collective agreement. The scheme of the Act is such that having concluded a collective agreement subsequent disagreements are ultimately resolved by third party adjudication. The Ontario Act does not require mid-term bargaining over job security issues as is required under certain other Statutes. [see Sections 150-153 Canada Labour Code]. This is not to say that the effects of these kinds of decisions should not be discussed with the bargaining agent as a party having a vital interest and in this case an on-going relationship with the company.

16. The recent Board decisions dealing with Section 14 violations have stressed the decision-making aspect of collective bargaining and have found actions by one party which undermines the decision-making capability of the other to be conduct in breach of the duty imposed by Section 14 of the Act. Collective bargaining as an exercise which underpins the social and economic structures of our society demands a high level of decision making capability and it follows that conduct which weakens this process must be found to be in violation of the Act. In the *Devilbiss [Canada] Limited* case [1976] OLRB Rep. March 49 refusal to supply the other side with information necessary to its decision-making capability was found to be contrary to Section 14. In the *Canadian Industries Limited* case [1976] OLRB Rep May 199 the unwillingness of one party to engage in a full discussion with the other was likewise found contrary to Section 14. In the *Graphic Center* case [1976] OLRB Rep. May. 221 the tabling of fresh demands during the concluding stage of bargaining was

found to undermine the decision-making framework of collective bargaining. [See also the recently released *Board of Health of Haliburton, Kawartha, Pine Ridge District Health Unit and H.E. Good* case, Board File 1066-76-U, decision dated February 15, 1977.] The Board has not previously dealt with alleged misrepresentation at the bargaining table. It is self-evident however, that misrepresentation, which is the antithesis of good faith, destroys the rational basis upon which informed collective bargaining decisions are made. These decisions which are in respect of compensation, job security and the other terms and conditions of employment must follow from full and honest discussion. Misrepresentation is alien to this process and is contrary to the duty set out in Section 14 of the Act.

17 The Board in dealing with the alleged misrepresentation must be circumspect in its examination of the evidence. The alleged misrepresentation will inevitably rest upon some verbal exchange or discussion during the course of bargaining. The Board must be mindful of the comprehension difficulties attendant with any endeavour necessitating verbal communication between two groups of persons, especially two groups holding divergent viewpoints. The messages given across the bargaining table are not always the messages received, whether by reason of having been vaguely delivered [often deliberately], or by reason of having been misconstrued in the light of expectation or, if during a period of third party intervention, by reason of not having been accurately relayed. The Board must carefully sift the evidence and assess the credibility of the witnesses in light of these considerations and in light of events subsequent to the conclusion of bargaining. The legal burden of establishing a violation of Section 14 of the Act rests with the party making the allegation, which in the instant case is the applicant union.

18. The essence of the union's allegation is that the company, through Mr. Morris, gave assurances upon which the union withdrew its demand for extended recognition. The union claims that subsequent events show the assurances to have been false and therefore in violation of Section 14 of the Act. The Board has reviewed the evidence of Messrs. Morris and Gilbert on the company side and Messrs. Fitzpatrick and MacNeil on the union side and is satisfied that the assurances given to the union were to the effect that there was no existing plan or intention to relocate part or all of the Strachan Avenue operations. The Board has been persuaded in this regard by the evidence of Mr. Fitzpatrick. He testified that Mr. Morris said to him that the company had no "intention" of moving the operation for ten years. When asked in cross-examination to recount, as best he could, the exact words of Mr. Morris, he replied that Mr. Morris said "John you don't need that, we don't have any damn plans to move and you know it." The Board is satisfied that the assurance given by the company was to the effect that the company had no plan or intention to relocate. The assurance must be construed in light of the dynamics of modern business; dynamics which underscore trade union demands in the area of job security. In this context an assurance that there is no existing plan to relocate must be distinguished from an assurance that the company will not relocate and it must be assumed that experienced negotiators would not confuse the one with the other. In the instant case we are dealing with the former.

19. In the face of its assurance and the subsequent relocation of the National Parts and Service operations the company undertook to lead evidence going to the inception of the plan which resulted in the relocation. The Board has found in paragraph 8 herein that the plan to relocate was conceived on the basis of information which became known to the company decision-makers in the period September 1975 to March, 1976. The Board is satisfied that the company did not plan the relocation of these functions until about March of



1976 and that a formal decision in this regard was not made until October 27, 1976. Accordingly, the verbal assurances given to the union during the course of the 1974 negotiations cannot be construed as a misrepresentation. There is no evidence upon which to support a finding of bargaining in bad faith and it follows that the Board must consider the other issues raised in this case in the light of the recognition clauses as they are set out in the subsisting collective agreements.

20. The scope of a trade union's recognition [in other than voluntary recognition situations] is initially set by the Ontario Labour Relations Board certificate. The Board practice is to certify an applicant trade union, which evidences sufficient membership support, for all employees of the employer within a named municipality. The municipal boundary has been the rough and pragmatic response of the Board to the conflict generated by the desirability for continuity of bargaining rights on the one hand [i.e. when a plant relocates] and the requirement for freedom of choice on the other. The fine-tuning is left to the parties. Whereas the certificate establishes the initial scope of the union jurisdiction the parties are free to negotiate an expanded recognition [subject to the statutory protections afforded those covered by a voluntary recognition]. It is the parties themselves who are best equipped to make the necessary trade-offs between management rights, union rights and employee rights. It is they who are best equipped to make their own bargain and to thereby set the parameters of their own relationship. Professor P. Weiler in considering the appropriate arbitral response to the issues raised by the setting of the line dividing management rights from job security [i.e. plant relocation] underscored the private nature of the arrangement and the advisability of a "laissez-faire" approach by arbitrators in an article entitled "*The Role of the Arbitrator*" [see, University of Toronto Law Journal Vol. XIX No. 1 1969 at page 16]. He said:

"However, as you proceed farther along the spectrum of arbitration issues, you reach the type of 'gut problems' for which it is quite illegitimate to suppose any basic consensus among the parties as to how they should be resolved. The classic example of this issue we have already discussed, the conflict between management rights and job security in the context of subcontracting, technological change, work assignment, relocation, etc. In effect, *these are issues which are eminently bargainable, issues which can find no more objective criteria for resolution than relative bargaining strength, as finally implemented in an armistice line which defines the boundary between 'unilateral managerial discretion' and 'employee job security.'* As to these it is improper to say *there is a common purpose, first because as a matter of empirical fact it is not so and, secondly because the whole logic of development of collective bargaining establishes these issues as the problems for which collective negotiation and agreement is designed to deal ...*

The institution of arbitration is functionally unsuited to the disposition of this type of problem because it is incapable of solution even by a *creative* elaboration of law. *The decision of when and how to change the armistice line between management function and union control is one which itself cannot be subjected to law, any more than can the decision of when to legislate. Moreover, it is undesirable for the arbitrator to shake off the restraints of his institutional role and begin to act in a way best calculated to achieve effective mediation or industrial statesmanship. This necessary confusion of role will detract from the*



*long-range moral acceptability of the results of arbitration even when confined within its proper limits. This moral acceptability [because it is believed that such an impartial decision is 'right'] is greatly dependent on its rational quality, on its actual and apparent derivation from institutionally established standards or purposes. If some of this adjudicative acceptability is misused for the short-term goal of alleviating a particular problem, it will harm a social institution for decision-making which is much more important than any instant, substantive results ....*

*However, the premises relied on in the subcontracting and other analogous areas just do not have the mutually intended and established content necessary for those conclusions [ limitation on unilateral change] to be derived from them. Nor is the arbitrator warranted in reasoning in accordance with what he believes to be most consistent with legislative policies and standards, to remake the parties' contract for them. The legislative presumption is that freedom of contract, not compulsory 'interest dispute' arbitration, is the rule."*

[Emphasis added.]

The bargain must speak for itself.

21. The recognition clause in the local 2900 agreement provides:

"1.01 the Company recognizes the Union as the sole collective Bargaining Agency for all of its employees in the Metropolitan Toronto area with the following exceptions: office and clerical staff, technical staffs, security guards, foremen and those above the rank of foreman."

The recognition clause in the local 4487 agreement provides:

"1.01 [a] The Company recognizes the Union as the sole Collective Bargaining agency for its salaried employees of its plant at 14 Strachan Ave., Toronto, with the following exceptions: supervisors, persons above this rank, salesmen, sales statisticians, draftsmen, tool designers, production and product engineers, time study and methods men, security guards, professional employees, personnel and payroll department employees, senior clerks in the financial divisions, material analysts, procurement analysts, systems analysts, procedures analysts, programmers, computer operators, employees engaged in confidential work relating to labour relations, secretaries or stenographers to management personnel and all employees excused specifically by the Labour Relations Act."

In respect to Local 2900 the parties have drawn the line of union jurisdiction at the Metropolitan Toronto boundary and in respect of Local 4487 the parties have agreed to limit the jurisdiction of the Union to the company's premises at 14 Strachan Avenue. The effect of these recognition clauses is to place the relocated facilities beyond the scope of either collective agreement and beyond the jurisdiction of the union. The employees hired to work at these facilities while free to join a trade union of their choice will not be covered by either of the collective agreements.

22. The evidence establishes that the servicemen who will work *out of* these facilities will continue to service the same geographic area as before the relocation, including the Metropolitan Toronto Area. The Board, if it is to properly evaluate the conduct of the company vis-a-vis the servicemen, must determine if the scope clause in the Local 2900 agreement covers servicemen situate outside Metropolitan Toronto who continue to service the customers of the company within Metropolitan Toronto. Whereas the Board normally defers to the arbitration process the interpretation of this clause is inextricably interwoven with the complaints filed under the Act and in the circumstances it falls to the Board to interpret the relevant provision. It is arguable that the Local 2900 recognition clause covers all work performed in the Metropolitan Toronto area. [See re *Canada Bread and Milk and Bread Drivers* etc. [1974] 4 L.A.C. [2d] 307 [Brandt] and re *Retail Clerks International Association and Central Supermarkets Ltd.* [1970] 22 L.A.C. 148 [Palmer] . Whereas it is arguable the clause on its face is not clear and in the circumstances the Board is entitled to consider the extrinsic evidence before it, [see *Sault Ste. Marie Board of Education and C.U.P.E.* [1974] 5 L.A.C. [2d] 179 [Shime] and the reference therein to *R.V. Barber et al Ex.P Warehousemen and Miscellaneous Drivers Local 419* [1968] 2 OR 245 68 D.L.R. [2d] 682]. The evidence convinces the Board that the parties understood the subsisting collective agreement between them to cover only work emanating from within Metropolitan Toronto. The company understood this to be so [see paragraphs 9, 11 and 13 herein] and the bargaining stance adopted by the union in 1974 convinces the Board that the union is also of such a mind. Mr. Fitzpatrick testified that he was responsible for holding out for extended recognition because, in his own words, "I thought they would move the service operation if they needed space." He testified that he explained to the mediators that, "a move of the service department was logical." If the union was of a mind that all service work performed in the Metropolitan Toronto area [regardless of where the servicemen were headquartered] was covered by the existing recognition clause [which was not altered in bargaining] then surely the possible relocation of the service function would not have formed the basis of the union demand for extended recognition. The "armistice line" as negotiated by the parties excludes the union from jurisdiction over employees performing work which emanates from outside the Metropolitan Toronto area, i.e. the work emanating from the relocated Toronto Service and National Parts operations.

23. The rights of the union in this matter operate on two levels and it is important that a clear distinction be made between the two. The union enjoys rights of *representation* and rights to *organization*. The line between the two is drawn by the parties and finds expression in the scope of the collective agreement. The union has the right, protected by law [Section 59] to exclusively represent the employees falling within the bargaining unit. The employer is prohibited from bargaining with or entering into a collective agreement which is designed or intended to be binding upon any employee in the bargaining unit so long as the trade union is entitled to represent employee[s]. The section protects the incumbents' bargaining rights as set out in the agreement. It [Section 59] does not however extend the union's exclusive right of representation beyond the scope of the existing collective agreement. [See re *Syndicat Catholique des Employes de Magasins de Quebec Inc. v. La Compagnie Paquet Ltd.* [1959] 18 D.L.R. [2d] 346] and indeed the freedom of employees to choose a bargaining agent and of trade unions to organize dictates that this be so.

24. Section 59 of the Act reads:



“59. [1] No employer, employers’ organization or person acting on behalf of an employer or an employers’ organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.”

The evidence establishes that the company dealt directly with the affected employees. It announced directly to them its decision to relocate, it served all of these persons with notices of lay-off and offered to the servicemen and certain others, employment at the new locations under the company’s “non-union compensation plan.” Neither of the respective locals nor the International were directly involved in the tendering of the information or the proposals to the affected employees. Whereas the employer might have shown a greater sensitivity to the interest of the bargaining agent it did not violate Section 59 of the Act in either the substance or the form of its dealings with the employees.

25. Implicit in the prohibition imposed by Section 59 of the Act in respect of direct bargaining between the company and the individual employee[s] is the requirement that the items bargained lie within the union’s exclusive right of representation. It has never been suggested that Section 59 prohibits the company from offering employment outside the scope of the union recognition clause [i.e. promotion, relocation]. The union has no right to bargain about the terms and conditions of such employment and clearly these terms and conditions cannot be construed as “binding upon the employees in the bargaining unit or any of them”, if they do not become effective until after the employee[s] has left the scope of the unit [i.e. has left the work covered by the collective agreement]. In the instant case the substance of the company’s dealings with the employees cannot be found to be in violation of Section 59 of the Act because they do not undermine the union’s exclusive rights of representation as established in the scope clauses of the collective agreement.

26. Section 59 of the Act does not entitle a trade union to be brought into the company decision-making process. The degree of union involvement is a matter of negotiation between the parties [see Article 4 of both agreements – Management Rights – which explicitly gives the company the right to determine the number and location of its plants]. The failure of the company in the instant case to involve the union in its decision making process cannot be found to be in violation of Section 59. Similarly Section 59 does not entitle a trade union to participate in all contacts between the company and its employees. [See re *American Can Co. and Sheet Metal Workers Association* [1975] 19 L.A.C. [2d] 73 [Arthurs] . The rights of the union in this regard are also established in the collective agreement and are enforceable thereunder. The parties to this matter have turned their minds to this question and have stipulated in their collective agreement that a union steward be present whenever an employee is interviewed regarding discipline. There is no other similar stipulation regarding union presence during discussion between the company and an employee[s]. The failure of the company to invite the union to be present during its presentation to the affected employees cannot of itself be construed as a violation of Section 59 of the Act. The form of the company’s dealings with the affected employees did not violate the Act. The union’s rights of representation have not been violated.



27. The Board would note as an aside that if the company were precluded from offering bargaining unit employees the opportunity for employment at its relocated facilities the result would be to work a hardship on both the affected employees and other junior employees. If the company were precluded from offering specific terms and conditions of employment the affected employees would be unable to make an informed choice as between relocation and the exercise of seniority rights within the existing unit. In an atmosphere of uncertainty resort to bumping would increase with the resultant displacement of junior employees and the hiring of "strangers" at the new locations. The company cannot unilaterally transfer employees from within the scope of the unit and thereby by-pass the seniority provisions which are set out in the collective agreement; [see *Re United Steelworkers and Rosco Metal Products Ltd.* 17 L.A.C. 8 and *re U.A.W. Local 89 and Reflex Corporation of Canada Ltd.* 22 L.A.C. 207]. The employees are entitled to exercise their seniority rights and the evidence in this case establishes that the company recognizes its obligation in this regard. If, however, there is an alternative to the exercise of seniority rights, albeit one which causes an employee to remove himself from the scope of the bargaining unit, it would not make good sense to require the affected employee to exercise seniority rights without knowledge of what may or may not be for him an acceptable alternative.

28. The Board now turns to the union's rights of *organization* and the employees' rights of selection which are protected by Sections 56 and 58 of the Act. At the time of the hearing in this matter there were no employees physically located at the new facilities and therefore in a position to select a bargaining agent. The Board is satisfied that neither of these sections have been violated. The relocation of the National Parts and Toronto Service operation was the result of legitimate business considerations. The notices of lay-off and the offers of employment which arose out of these legitimate decisions cannot be construed as threats, promises, coercion or undue influence within the meaning of Section 56 or 58 of the Act. In the face of the recognition clauses in the existing agreements the trade union has no rights in respect of the relocated facilities other than the right to attempt to organize those who will work at or out of these facilities. The employees who will work at or out of these new facilities have a right under the Act to choose a bargaining agent of their choice. The evidence does not establish that the company has infringed upon either of these basic rights. The Board finds there to be no violation of either Section 56 or Section 58 of the Act.

29. The Company has conducted itself within the Act in its handling of the relocation. Nonetheless its decisions to exclude the local executive from its announcements to the affected employees and to repeatedly refer to the "non-union compensation plan" in its discussions with the employees indicates a lack of sensitivity to its on-going relationship with the trade union; a relationship suffering the scars of a four month strike in 1974 and a relationship about to endure the stress of another round of negotiations. More importantly from the Board's point of view, the evidence establishes a conscious consideration by the company of the non-union status of the relocated facilities [see paragraph 12 herein]. The Board has made reference to the right of the employees at the new facilities to choose a bargaining agent of their choice and the right of the applicant unions to seek to organize these persons. In the face of the evidence set out in paragraph 12 herein the Board reiterates that these are basic freedoms which are guaranteed in the Act and which the employees and the union are entitled to exercise free of employer interference.

30. Having regard to all of the foregoing this application is dismissed.

**DECISION OF BOARD MEMBER O. HODGES:**

1. Considering the time at which statements were made to the union by the respondent in 1974, when extension of the bargaining units was dealt with as a collective bargaining demand of the complainants, Local 2900 and Local 4487, I join in finding that there was no violation of Section 14 of the Act up to and including 27th October, 1976. However, when the plans which the management had been working on for many months were approved by the Board of Directors on 27th October, 1976 and were thereupon put in motion, a new chapter in the relationship of the parties began. From this point forward the respondent clearly failed to conduct itself in a manner that could be said to comply with the spirit of the Labour Relations Act as expressed in the Preamble:

“Whereas it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.”

2. The evidence leaves no doubt that the respondent intended and planned that the employee complement at its new locations at Malton, Mississauga and Markham would be recruited from among employees represented by Local 2900 and Local 4487. The evidence is also very clear that every stratagem and manoeuvre the respondent could devise to avoid recognizing the interest of these Locals in meeting their representative obligations to their members was carefully orchestrated and carried out with military precision. There is in evidence the meetings of 17th November, 1976 and the preparatory management meetings which reveal the motive in this master plan to assure a non-union status at the new locations [see paragraph 12 of the majority decision].

3. Section 56 provides:

“No employer ... and no persons acting on behalf of an employer ... shall ... interfere with the ... representation of employees by a trade union ...”

Section 59 provides:

“No employer ... or person acting on behalf of an employer ... shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with ... any person ... purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.”

I join in the finding of my colleagues in part of paragraph 22 of the majority decision wherein they state: “Whereas the Board normally defers to the arbitration process, the interpretation of this clause is inextricably interwoven with the complaints filed under the Act and in the circumstances it fails to the Board to interpret the relevant provision.” The same principle must also apply to other parts of the collective agreements with Local 2900 and Local 4487 which in my view are “inextricably interwoven with the complaints filed under the Act.”

4. My colleagues appear to disregard the continuing relationship, and responsibility of these local unions with and for their membership under the terms of both collective agreements:

Local 2900 – Article 32 – Layoff Procedure

Article 33 – Notice of Layoff

Local 4487 – Article 30 – Layoff Procedure

My understanding of the evidence discloses a deliberate and studied endeavour by the respondent to avoid its obligation to advise and discuss pending lay-offs with the local unions as required by the Collective Agreements. The local unions thus suffered interference in violation of s. 56, and I so find.

5. In a cleverly designed direct approach to employees represented by Local 2900 and 4487, the respondent undertook to bargain with those employees which the respondent required to fill the same or similar jobs at the new locations. Indeed, one could well say these employees would be doing the very same kind of work as they were then doing at and out of 14 Strachan Avenue in Metro Toronto. The local unions were thus cut off from their normal consultative role which would otherwise have been available to employees within the bargaining unit. I find the activity of the respondent here a violation of s. 59.

6. The right to representation by a trade union without interference is the clear admonition to employers evident in s. 58. Considering all of the evidence, and in particular the excerpts from company minutes set out in paragraph 12 of the majority decision, I find discrimination, restraint and compulsion by the respondent in violation of s. 58.

7. To properly fulfil the trade union's representative function and obligation to all employees in the bargaining units, these local unions should have been fully informed of the employer's plans concerning the transfer of employees to the new locations. Union members would then have enjoyed the right of meaningful union assistance in weighing the options offered by the employer.

8. Considering all of the evidence, and in the particular circumstances of this case, my remedy would invoke the remedial powers of the Board under s. 79, which in my view give the Board authority to extend the collective agreements between the complainants and the respondent to include the locations at Malton, Mississauga and Markham, and I so order, effective as applicable from 27th October, 1976.

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**1758-76-U** George Zebrowski, [Complainant], v. Graphic Arts International Union, Local 517 and Lawson and Jones Limited, [Respondents].

**Section 79 – Duty of Fair Representation – Effect of member’s refusal to pay fines levied by union – Whether expulsion from union which leads to discharge of employee a breach of duty of fair representation – Whether a violation of section 38 [2] of the Act.**

**BEFORE:** Ian C.A. Springate, Vice-Chairman and Board Members O. Hodges and F.W. Murray.

**APPEARANCES:** *George Zebrowski for the complainant; Wm. Rastin, Jeffrey Sack and Henry Ashworth for the respondent trade union; F. Pamenter and G. Owen for the respondent employer.*

**DECISION OF THE BOARD:** March 21, 1977

1. The name “Graphic Arts International Union” appearing in the style of cause of this complaint as the name of the respondent trade union is amended to read “Graphic Arts International Union, Local 517.” The name “Lawson & Jones Co.” appearing in the style of cause of this complaint as the name of the respondent employer is amended to read “Lawson & Jones Limited.”

2. This is a complaint which alleges that the respondent trade union has violated a number of sections of The Labour Relations Act. At the hearing the complainant limited his case to alleging that the respondent trade union had violated both section 60 and section 38 of the Act. At the hearing the Board orally dismissed the complaint. What follows are the written reasons as to why the complaint was dismissed.

3. The respondent trade union is the bargaining agent for a bargaining unit comprised of certain employees of the respondent employer.

4. The complainant was formerly employed by London Printing and Litho, a company which in the fall of 1973 was purchased by the respondent employer. The operations of London Printing and Litho were subsequently merged into those of the respondent employer, and during the course of this process the complainant became an employee of the respondent employer.

5. On February 1, 1974 the complainant made a formal application to become a member of the respondent trade union, an application which was approved at a meeting of the union’s membership on February 6, 1974. On March 6, 1974 the complainant, pursuant to Article 21.3 of the “Constitution and Laws” of the Graphic Arts International Union, took the formal “obligation of membership” as a member of both the respondent trade union and of its parent international union. The obligation of membership takes the form of an oath [or affirmation] which begins as follows:

“I do solemnly swear [or affirm] that I will to the utmost of my abilities faithfully discharge the duties and obligations pertaining to membership in the Graphic Arts International Union and of the Local into which I enter membership.”

Subsequent to this the complainant attended and voted at a number of meetings of the membership of the respondent trade union.

6. On July 17, 1974 a new collective agreement was executed by the respondent employer and by the respondent trade union. As did the collective agreement which preceded it, this collective agreement contained a "maintenance of membership" clause which provided that all employees who were members of the respondent trade union when the collective agreement was executed must, as a condition of continued employment, maintain their membership in the union. The collective agreement also stipulated that non-members of the union must, as a condition of employment, pay an amount equivalent to the regular union weekly membership dues and assessments to the respondent trade union.

7. Employees of the respondent employer could, at the time, sign one of two different types of forms directing the respondent employer to deduct certain amounts from their pay for forwarding to the respondent trade union. One such form was designed to be signed by union members to authorize a check-off from their pay of their union dues and assessments. The other was designed for use by non-members who were required to pay an amount equal to union dues and assessments. The complainant signed, and filed with the respondent employer, the form meant to be used by non-members of the union. At the time the respondent trade union was unaware that this was the form which had been signed. However, every month the respondent trade union received in the normal course from the respondent employer amounts on behalf of the complainant which were credited against both his regular monthly union dues and assessments and against certain fines which had been levied against him.

8. The "Constitution and Laws" of the Graphic Arts International Union provide that a local may establish attendance requirements for members at meetings and may provide fines for the enforcement of those attendance requirements. The by-laws of the respondent trade union in fact set forth such attendance requirements and fines. These by-laws provide that if a member fails to attend at least one regular monthly membership meeting in set time periods of 3 or 4 months duration, then he will be fined \$3.00. Should a member fail to attend all regular monthly meetings over a calendar year the maximum fine for doing so will total \$9.00. The by-laws also provide that a member will become liable to a fine of \$5.00 should he miss a special [or "summons"] membership meeting.

9. The last union meeting attended by the grievor was a special membership meeting held in June of 1974. As a result of his non-attendance at any meetings subsequent to that time a number of fines were levied against him, none of which he paid. These fines amounted to \$3.00 in 1974, \$9.00 in 1975 and \$5.00 in 1976 for a total of \$17.00. When the figure reached this point, the executive of the respondent union decided that nothing was to be gained by allowing the amount owed to grow any larger, and thus no additional fines were levied against the complainant. Pursuant to the by-laws of the respondent trade union the money received on behalf of the complainant from the respondent employer was credited first against the fines which had been levied against him and then against his regular union dues. Thus, in the view of the respondent trade union the \$17.00 came to represent an arrears in the complainant's regular dues.

10. On January 14, 1975 and again on August 8, 1975 the complainant wrote to the respondent trade union concerning the issue of the fines. It was his contention that since he



had signed the authorization form for non-union members rather than the one for members he had effectively cancelled his application for membership in the union and thus had been under no obligation to attend membership meetings. This contention was rejected by the respondent trade union. It is the Board's opinion that on March 6, 1974 the complainant became a member of the respondent trade union. More importantly, for this case, the respondent trade union believed the complainant to be a member. It is possible that the complainant by his letters of January 14 and/or August 8, 1975 withdrew from membership. However, having regard to subsequent events it is not necessary for us to decide this point.

11. The \$17.00 remaining outstanding appears to have become an irritant among other union members who complained that while they were obliged to pay non-attendance fines the complainant was not. Although a number of earlier attempts by members of the respondent trade union to convince the complainant to pay the money had failed, on March 11, 1976 Mr. H. Ashworth, an International Representative of The Graphic Arts International Union, met with the complainant. The complainant, however, remained steadfast in his refusal to pay the money.

12. On May 3, 1976 the respondent trade union sent to the complainant a letter informing him that its executive had formally charged him with a breach of the union's by-laws and that a trial would be held in this regard to which he was entitled to attend in his own defence. The trial was held on May 26, 1976 without the grievor in attendance. The decision of the trial board was to recommend that the complainant be expelled from membership due to his non-payment of dues to the amount of \$17.00. The complainant was then notified that the recommendation of the trial board would be put before a meeting of the union membership on September 1, 1976, and that he had a right to attend at that meeting and speak on his own behalf. The grievor did not attend at the membership meeting. The members who did attend voted in favour of expelling the complainant. However, prior to this becoming effective the complainant was given a five-day period of grace in which to pay the \$17.00. This he failed to do.

13. On September 17, 1976 Mr. W. Rustin, the President of the respondent trade union, formally requested of the respondent employer that the complainant be discharged in that he had not maintained his union membership as required by the collective agreement. However, in the letter which set forth this request Mr. Rustin proposed that no discharge actually occur until he had met with representatives of the employer. Subsequently, Mr. Rustin along with a representative of the respondent employer met together with the complainant to try to convince him to pay the \$17.00. The complainant was adamant in his refusal to do so, and was in fact subsequently discharged by the respondent company.

14. At the hearing the complainant indicated that he did not want to return to his former job, but rather he was claiming \$3,000.00 in compensation from the respondent trade union.

15. Section 60 stipulates that a trade union shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of employees. In this case there is no indication that the respondent trade union acted arbitrarily in the sense of acting without really concerning itself with the particular facts confronting it. Similarly, it does not appear that the complainant was treated any differently than any other employee in his position



would have been. Thus we are of the view that the respondent trade union did not act in a discriminatory manner towards the complainant. Finally, we are of the view, that the respondent trade union did not act in bad faith. Rather, the union when faced with a source of discontent among other members sought only to have the complainant conform to its established rules. At every step the door was left open for the complainant to re-establish his membership in good standing and thus avoid being discharged. While the outcome of this entire episode is unfortunate indeed, we find that in acting as it did the respondent trade union did not violate section 60 of the Act.

16 Section 38[2] of the Act stipulates that a trade union shall not require an employer to discharge an employee because he has been expelled from membership in the union for the reason that he has refused to pay "initiation fees, dues or other assessments to the trade union which are unreasonable." While we expressly refrain from making any judgments to the wisdom of a union fining its members for non-attendance at meetings, having particular regard to the scale of the fines in this case we are of the view that the fines here were not unreasonable. Thus we find that the respondent trade union did not breach section 38 of the Act.

17. The Board re-affirms its oral ruling of February 4, 1977 wherein it dismissed this complaint.

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**1687-76-U** Leonard Murphy, [Complainant], v. International Printing and Graphic Communications Union, Local 482, [Respondent].

**Section 79 – Duty of Fair Representation – Whether conduct of union official constitutes breach of duty of fair representation – whether Board will order arbitration – effect of remedial order on collective agreement.**

**BEFORE:** Pamela C. Picher, Vice-Chairman.

**APPEARANCES:** *I.G. Thorne for the complainant; G.E. Lloyd, C.G. Polley, A.W. Toth and R. Williams for the respondent; D.G. Cunningham, Q.C., W.J. Sutcliffe and J.F. Madden for The Kingston Whig-Standard Co. Ltd.*

**DECISION OF THE BOARD:** March 11, 1977

1. This is a complaint under section 79 of the Labour Relations Act that the complainant, Leonard Murphy, and his co-grievor, Frank Shaw, have been dealt with contrary to the provisions of section 60 of the Act. More specifically, the grievors allege that in making the decision not to carry Mr. Murphy's and Mr. Shaw's grievances to arbitration the respondent union violated its duty of fair representation by acting in a manner that was both arbitrary and in bad faith.

2. By a letter dated January 6, 1977 the complainant requested that the grievor's employer, The Kingston Whig-Standard Co. Ltd., be added as a respondent for the purpose of

relief. At the hearing the employer took no objection of being named as a party but did object to the short notice in the event that it would have to answer to the merits of the discharges. On the assurance from the Board that the Board would not in the instant proceeding decide the merits of the discharges and that it would decide only whether or not the union had acted in violation of section 60, the employer withdrew its objection to being named as a party.

3. The complainant grievor, Mr. Leonard Murphy, was employed by The Whig-Standard for 14 years. At the time of his discharge on August 28, 1976 he was vice-president of the respondent union and shop steward in the press room. The co-grievor, Mr. Frank Shaw, also a member of the union, worked a total of eight years for The Whig-Standard. He was laid off in 1972; in 1974, on the initiative of the company, he was invited back to the company where he was continuously employed until his discharge on August 28, 1976.

4. Both grievors worked in the press room. Frank Bremner was their foreman and Sinclair Knox the assistant foreman. Throughout the relevant time Frank Gannon was the chairman of the "chapel" which is that portion of the bargaining unit covering The Whig-Standard press room. The parties estimated that there were approximately 33 employees in the bargaining unit and that approximately 11 of them were in the press room. The evidence further indicates that Mr. William Clarke had been president of Local 482 for well over a decade at the time he was replaced as president by Al Toth on January 6, 1977.

5. On August 28, 1976 Mr. Jim Sutcliffe, General Manager of The Whig-Standard, called Mr. Murphy and Mr. Shaw into his office; he gave them identical termination letters which read as follows:

"I regret that I must advise you that your services are no longer required by The Whig-Standard after August 28, 1976.

We find your work unsatisfactory, you are incompatible and unco-operative and we have therefore made other arrangements for your situation to be filled.

Enclosed is a cheque for severance pay as per the attached statement, together with Unemployment Insurance and OHIP separation forms."

The evidence shows that the "other arrangements" referred to in the termination letter were that Mr. Clarke's nephew and Mr. Knox's son would replace the grievors.

Mr. Murphy testified that his immediate request for some explanation for the discharge was denied by Mr. Sutcliffe with the assertion that it was all explained in the letter.

6. The evidence establishes that Mr. Clarke refused to give Mr. Murphy assistance in the preparation of his grievance, and that Mr. Murphy, on his own, filed a timely grievance which reads in part as follows:

"I would like to point out that I find the reasons for my dismissal to be most unreal since I have been employed with the Company for the past fourteen years.

In that time, I have learned a great deal about my trade as a Journeyman for which I hold a Journeyman's Newspaper Pressman Certificate. I have always been conscientious with regard to my work, helpful and co-operative with my fellow employees. Their welfare and that of the Company's have always been of prime importance to me since I started work there in 1962.

I fail to understand now, after having given fourteen years of good service to The Whig-Standard why I should be, all of a sudden, dismissed without prior notice, or any explanation, in detail, of the reasons why I was dismissed.

I am of the opinion that the above substantiation and my long and faithful service to the Company should warrant consideration for my reinstatement."

7. The grievance procedure to be followed in a discharge case is set out in section 9 of the collective agreement:

"9 [a] A claim by a permanent employee that he has been unjustly discharged shall be treated as a grievance if a written statement of such grievance is lodged by the employee with the General Manager within five days after the employee ceases to work for the Company. Such grievance shall be taken up at a special meeting of the General Manager with the Union Committee.

[b] Such special grievance may be settled by confirming the Company's action in dismissing the employee, or by reinstating the employee, or by other arrangement which is just and equitable in the opinion of the conferring parties, or in accordance with the above provision for arbitration."

The Union Committee is defined in section 3 of the collective agreement:

"'Union Committee' " is a Committee composed of two employees properly accredited in writing by the Union. The Union shall accredit a third employee who shall act in the absence of a regular committee member."

8. In purported compliance with article 9[a], a document dated September 2, 1976 was circulated among the members of The Whig-Standard chapel to appoint Mr. Clarke and Mr. Gannon to the Union Committee to act on the union's behalf in the grievances of Mr. Murphy and Mr. Shaw. The parties were in agreement at the hearing that the above appointment of the Union Committee was not in compliance with the collective agreement because authorization was given by the chapel only and not by the entire bargaining unit.

9. The evidence establishes that the company arranged a meeting for the afternoon of September 3, 1976 between itself and the Union Committee to consider the grievances of Mr. Murphy and Mr. Shaw. The grievors were formally invited by registered mail letters.

10. Mr. Williams, president of the Quebec and Eastern Ontario District Joint Council of the I.P.G.C.U. testified that on August 31, 1976 Mr. Polley, secretary/treasurer of Local

reinstatement."



482, contacted Mr. Williams for assistance in the defence of Mr. Shaw and Mr. Murphy. That Mr. Williams had to be contacted indicates to the Board that there was concern developing at this time as to whether or not the grievors would be fairly represented by the Union Committee. Mr. Williams testified that on September 2nd he called Mr. Clarke requesting a postponement of the September 3rd meeting so that he could attend. The following day Mr. Clarke informed Mr. Williams that the meeting was going to proceed and that Mr. Williams had no right to sit in. He further stated that both he and Mr. Gannon thought that the grievors were guilty.

11. Because of mechanical difficulty with his truck, Mr. Murphy could not attend the September 3rd meeting; accordingly, a second meeting was arranged to take place on September 7th. Mr. Shaw went to the September 3rd meeting accompanied by his lawyer, Mr. Thorne. Mr. Thorne was refused entrance. At the meeting Mr. Sutcliffe enumerated the reasons for discharge. When Mr. Shaw was told that he would not receive them in writing he took them down in long hand. The list, submitted as Exhibit #7, reads as follows:

- [1] I refused to plate the press five years ago.
- [2] I refused to clean ink demist wires.
- [3] I take twice as long to clean pumps.
- [4] I argued about cleaning a pump, said it wasn't my turn, then I told assistant foreman it was open warfare.
- [5] I refused to man the folder, chapel chairman was told.
- [6] I don't ink the press properly.

12. Mr. Shaw's testimony that he was given no details whatsoever as to the time or circumstances surrounding these accusations was uncontradicted. During the meeting, Mr. Shaw asked for a caucus with Mr. Gannon and Mr. Clarke. He testified that when he asked Mr. Gannon if he thought the reasons were justified Mr. Gannon replied "not all of them" and Mr. Clarke said "some are." He further testified that in response to his assertion that the reasons didn't justify dismissal, Mr. Clarke told him that if he wanted to go to arbitration he would have to tell Mr. Sutcliffe himself because the Union Committee would not support the request. When Mr. Sutcliffe returned and Mr. Shaw said he wanted to go to arbitration, Mr. Sutcliffe replied "we consider the matter closed and are not going to arbitration."

13. Mr. Murphy went to his meeting on September 7th. Mr. Sutcliffe, Mr. Gannon and Mr. Clarke were present. He testified that even after he asked Mr. Sutcliffe to slow down as he gave the reasons for discharge, the continued pace made it impossible for him to record them all. He testified that he was told that his work wasn't good, that he was uncooperative with his foreman, Frank Bremner, and that he got into an argument with Mr. Bremner during which he used foul language. He said that when he asked Mr. Gannon and Mr. Clarke if they believed the story, Mr. Clarke said, "I think so" and Mr. Gannon just sat there. Mr. Murphy's assessment was that they just didn't seem to want to help him.

14. The testimony of Mr. Gannon expressly confirms that at neither of these two meetings was either grievor asked to give his side of the story. At the same time, however, Mr. Gannon testified that the purpose of the meetings was to "listen to the charges and see if they were true."

15. On September 7th Mr. Sutcliffe sent Mr. Shaw and Mr. Murphy separate letters signed by Mr. Clarke and Mr. Gannon as well as Mr. Sutcliffe, stating in each case that the members of the Union Committee endorsed the action taken by the company and that the matter was closed.

16. On September 8th, perhaps before being notified of the negative decisions contained in the above mentioned letters, Mr. Polley sent two letters to Mr. Sutcliffe [one on behalf of each grievor] requesting the company to appoint its nominee for a Board of Arbitration:

"In regard to the meeting held on Friday, September 3rd, [Tuesday, September 7th] 1976 concerning Mr. F. Shaw [Mr. L. Murphy].

Being as there has been no agreement reached, under section 9b, between the parties, the Union on behalf of Mr. Shaw requests a Board of Arbitration.

The person named by the Union as a member of the Board of Arbitration is Mr. R. Sievers, 207 Craig Street West, Room 11, Montreal, P.Q. H2Z 1#4. Telephone number is [514] 861-6509.

If you would kindly send the name of your member for the Board of Arbitration to Mr. R. Sievers at your earliest convenience a meeting could be arranged to select a chairman."

The Board views this letter as further evidence of the fact that there was early disagreement as to the proper management of these grievances. Mr. Polley testified that he did not at this time formally appoint Mr. Sievers as the union's nominee because Mr. Clarke refused to allow it.

17. With respect to employment history, Mr. Shaw testified, without contradiction, that throughout his employment he had never received a formal complaint about his work. Mr. Murphy testified, without contradiction as well, that in his 14 years of employment he had received two warnings of a minor nature but no other disciplinary action. Mr. Jackson, a fellow employee of 16 years standing, worked on the three man team of Murphy, Shaw and himself for about 1½ years. He testified that the two grievors worked to the standard of anyone else. The two grievors and Mr. Jackson each testified that the atmosphere in the press room was generally argumentative and that foul language was not uncommon.

18. We turn now on the action taken by the union following the September meetings and decision to affirm the company position. On September 13, 1976 an executive meeting of Local 482 was held. Frank Shaw tried unsuccessfully to attend. He testified that when Mr. Clarke grabbed his coat, closed the meeting before it began and walked off in anger at Mr. Shaw's presence, Mr. Shaw decided to leave voluntarily. Mr. Murphy who was a mem-

ber of the executive said that he thought the meeting had been called to talk about his dismissal but discovered that Mr. Clarke only wanted to talk about union dues. The evidence shows that when Mr. Murphy raised the matter of his grievance, Mr. Clarke insisted that the union supported the company and that the matter was closed. According to Mr. Murphy's testimony, when a fellow member of the executive, Kirk Snells, made some inquiries as to what had transpired with respect to the grievances, Mr. Clarke refused to discuss it.

19. A general meeting of Local 482 was convened on October 7, 1976. Both Mr. Murphy and Mr. Shaw were in attendance. Because Mr. Clarke was on holidays the meeting was chaired by someone other than Mr. Clarke. The matter of the dismissals was raised and it was agreed that the Union Committee had not been properly constituted under the terms of the collective agreement. The union then voted to send the matter to arbitration. In response to this decision Mr. Polley sent Mr. Sutcliffe a second letter informing him of the union's request for a Board of Arbitration.

20. At the next union meeting which took place on October 26, 1976 the union gave the proper authorization to Mr. Clarke and Mr. Gannon to constitute the Union Committee in the matter of the grievances of Mr. Murphy and Mr. Shaw. No evidence was given to the Board respecting what transpired between October 8th when the union voted to send the matter to arbitration and October 26th when the union decided to begin at step 1 again with the constitution of the Union Committee. The Board can only assume that it was decided that in order to fulfil the terms of the collective agreement, a properly constituted Union Committee would have to perform its function under section 9. When asked why the same two people were appointed to the Union Committee when they had already shown themselves to be unsatisfactory, Mr. Polley replied that he didn't know, but that no one else would stand for nomination.

21 Focusing on the company meeting with the properly constituted Union Committee which appears to have taken place on October 27th, there is conflicting testimony as to what the union authorized the Union Committee to do. Mr. Polley recalls that the Committee was simply instructed to meet with the company. Mr. Clarke and Mr. Gannon testified that no restrictions were put on them with respect to the impending meetings. Mr. Toth, the new president, on the other hand, testified that the Committee was specifically instructed not to render any decision at the meeting. Both Mr. Clarke and Mr. Gannon testified that the purpose of the meeting was to do the job all over again, i.e. to discuss the discharge and determine if they came to the same conclusion as before. Each agreed that the meeting lasted about fifteen minutes. There was further agreement that neither Mr. Murphy nor Mr. Shaw was notified of the meeting. Mr. Gannon's account of the meeting reflects that after Mr. Clarke explained why the group was convened for a second time, Mr. Sutcliffe read the reasons for discharge. As Mr. Gannon testified that one set of reasons was read for both grievors, the Board assumes that the reasons set before the gathering were those given in the letters of termination: poor work performance coupled with the assertion that they were incompatible and unco-operative. Mr. Gannon's testimony indicates that no specific incidents were discussed and that, at most, someone said Mr. Shaw had refused to work. No details of time, place or circumstance were brought up at this meeting.

22. Based on the meeting, Mr. Sutcliffe sent the following letter dated October 29, 1976 to Mr. Polley:



"I acknowledge receipt of your letter confirming the appointment by the Union of Mr. Clarke and Mr. Gannon to the Union Committee in the matter of the grievances of Mr. Murphy and Mr. Shaw.

As this Committee has already rendered a decision on the matter and they now assure me that they have no reason to reconsider that decision, the establishment of a Board of Arbitration is not required, and we consider the matter closed."

23. The parties agree that the grievors received no notice of the next general meeting of the union which took place on December 9, 1976. Mr. Polley accepted responsibility for the failure of the grievors to receive notice explaining that he had just returned from sick leave and simply forgot to notify the grievors. Mr. Shaw testified that when he learned on December 13th that the meeting had taken place and that Mr. Clarke had declared the matter closed after reading the above quoted letter from Mr. Sutcliffe, he approached Mr. Clarke for an explanation. At first Mr. Clarke denied that a meeting had taken place on December 9th. When Mr. Shaw repeated "December 9th" and asked why he wasn't notified, Mr. Clarke said, as he walked away, "It was none of your business."

24. We now turn to a determination of whether or not, on the above facts, the union has violated its duty of fair representation.

25. The Board has repeatedly held that employees do not have an automatic right to have their grievances taken to arbitration. Accordingly, the fact that the Union Committee did not recommend that the grievances of Mr. Murphy or Mr. Shaw be pursued to arbitration does not by itself constitute a violation of the union's duty of fair representation.

26. While the decision not to go to arbitration does not violate the Act, the Board must consider whether the process by which the Union Committee arrived at that decision meets the standard of fair representation set by section 60 which reads as follows:

"A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be."

27. To fulfil its duty of fair representation a union must process a grievance in a non arbitrary manner, i.e. it must direct its mind to the merits of a grievance and act on the available evidence; to determine the outcome of a grievance on the basis of an irrelevant fact or principle would be arbitrary. While the effective operation of the grievance machinery dictates that unions be allowed to consider factors beyond the merits of the particular grievance in deciding whether to settle a grievance short of arbitration, such considerations must have their roots in the welfare of the bargaining unit and the bargaining process. Additionally, section 60 prohibits a union from processing a grievance in bad faith. Without limiting the definition of bad faith it might be said that in the context of processing grievances a union would be acting in bad faith if its treatment of a grievance is motivated by hostility or ill will, if it deals dishonestly with the grievors in an attempt to deceive or if it refuses to fulfil its duty of processing the grievance fairly because of some sinister motive.

28. On the basis of all the evidence the Board finds that the Union Committee acted in an arbitrary manner in confirming the company's decision to discharge the grievors. From the accounts of what transpired both during and between the September and October meetings the Board is satisfied that the Union Committee never directed its mind to the merits of the grievances. Substantive evidence was neither placed before the Union Committee nor solicited by it. The uncontradicted evidence of the grievors was that they were never given any particulars of times, dates, or circumstances surrounding the offences with which they were charged. Not only was it made impossible for them to answer the charges since they were not given anything specific enough to respond to but, as Mr. Gannon admitted, the Union Committee never asked the grievors for their version of the situation. The conclusion that the Union Committee neither sought evidence nor decided the matter on the basis of evidence is underlined by Mr. Gannon's testimony concerning what transpired at the October meeting. When asked in cross-examination how he could judge the merits of a charge if no details were provided, Mr. Gannon said: "After a certain number of years you know if charges are true. I would just know if he had refused to work." Mr. Gannon conceded that he did not even know if the complaint of refusing to work was recent or years old and added: "I knew that at some time in the past they had done these things and it doesn't matter how long ago."

29. The Board cannot ignore the admitted fact that Mr. Clarke's nephew and the assistant foreman's son were the two persons brought in to replace the discharged grievors. As the letters of discharge indicate, these replacements were established before the grievors were informed of their discharges. In our view the most probable inference from the facts is that the grievors were victims of a situation in which the Union Committee was motivated by an inordinate desire to assure that the relatives of Mr. Clarke and the assistant foreman were not displaced by the return of the grievors. Given the lack of specific evidence before the Union Committee and the absence of any inquiries of the grievors as to what transpired, the weight of the evidence suggests that the familial relationship played a determining role in the Union Committee's decision to confirm the discharges. For the Union Committee to base its decision on such an irrelevant consideration, one which bears no relationship to the merits of the grievances or the welfare of the bargaining process, is to exercise its decision making responsibility in an arbitrary manner.

30. While the above finding of arbitrary conduct by itself constitutes a violation of section 60, the Board is moved by the facts of this case to find as well that the Union Committee acted in bad faith. A concern for the rights of the grievors was fully eclipsed by what the Board has concluded to be the desire to protect the position of the relatives of Mr. Clarke and the assistant foreman. When arbitrary conduct is motivated by a factor so extraneous and so counter to legitimate bargaining concerns it may reasonably be characterized as sinister. The full extent to which the grievors' rights were ignored indicates to this Board that they were the subject of the Union Committee's hostility. Signs of this hostility are evident from, among numerous factors, Mr. Clarke's refusal to assist Mr. Murphy with his grievance, his refusal to discuss the grievances at union meetings and his direct attempt to deceive Mr. Shaw about the occurrence of a meeting at which the grievances were discussed.

31. Counsel for the union argued that the actions of the Union Committee could not be seen to be the actions of the union for two reasons: firstly, because the Union Committee was not properly authorized for the September meeting and secondly, because at the Octo-



her meeting the Committee acted outside the scope of its authority in that it was not supposed to make a final determination of the disposition of the grievance. The Board cannot accept this attempt to absolve the union from bearing responsibility for the actions of its president and chapel chairman. That the Union Committee was not in the first instance properly constituted was admitted to have been the result of the union's misreading of the collective agreement. With respect to the second point there is conflicting evidence as to what, if any, specific instructions were given to the properly constituted Union Committee. Accordingly, the Board is not willing to find that the Committee acted contrary to instructions much less to decide what, if any, ramifications would flow from such disobedience. The union must bear the responsibility for the actions of persons acting on its behalf. This principle is supported by section 88[2] of the Act.

"Any act or thing done or omitted by an officer, official or agent of a trade union or council of trade unions or employers' organization within the scope of his authority to act on behalf of the union, council or organization shall be deemed to be an act or thing done or omitted by the union, council, or organization."

32. Notwithstanding the fact that the union must bear the responsibility for the actions of the Union Committee, the evidence shows that it is only the two men on the Union Committee who were responsible for the failure of the union to represent the grievors fairly. The evidence shows that the union as a whole and the other members of the executive wanted to see the grievances properly resolved. As early as September 8th Mr. Polley sought to appoint an arbitrator but was refused permission by Mr. Clarke. On October 7th the union, in Mr. Clarke's absence, voted at its general meeting to send the matters to arbitration. On January 6, 1977 the union voted into office a new president to replace Mr. Clarke and once again voted to send the matters to arbitration. There is no question, therefore, that since January 6th the union has properly represented the grievors. The union's remedial action, however, cannot cure the previously established violation because it cannot absorb the delay already caused the grievors in the proper resolution of their claim. While the union is presently doing everything in its power to bring the matter to arbitration and it now appears to be the company that is causing the delay, the reason for the company's refusal to appoint its nominee [that the matter has already been settled under the terms of the collective agreement by the Union Committee's confirmation of the discharges] has its roots in the union's violation of section 60. Thus while the union has not been in violation of section 60 since January 6th, the adverse effect of its previous violation is still being felt and is still the responsibility of the union.

33. We must now determine what remedy will most appropriately cure the damage occasioned by the union's violation of the Act.

34. Section 79[4] of the Act gives the Board broad remedial authority and reads in part as follows:

"79[4] ... and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act is shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determi-



nation, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

[a] an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;

[b] an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or

[c] an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally."

Without limiting the scope of possible orders the Act specifically endorses orders to cease doing the act[s] complained of, to rectify the act[s] complained of and to reinstate and/or compensate. That the section states that such orders may be made "notwithstanding the provisions of any collective agreement" implies that an order may override the terms of the collective agreement and thereby affect parties other than the specific offender. The breadth and flexibility of the remedial powers given the Board under section 79 enable the Board to respond directly to a specific violation of the Act and to as nearly as possible put the parties into the position they would have been in if the violation of the Act had not occurred.

35. In this case the arbitrary and bad faith conduct of the Union Committee denied the grievors their chance to have their grievances heard on the merits in arbitration. What remedy will most appropriately rectify this loss?

36. An isolated order for damages against the union would not be an appropriate remedy in the circumstances of this case; it is only in the event that the grievances are ultimately successful at arbitration the grievors will have suffered financially from the union's violation of section 60. If the grievors were properly discharged, the union's mis-management will not have prejudiced the grievors beyond delaying the ultimate resolution of their rights.

37. Since the Board found that the violation of section 60 stemmed from the failure of the Union Committee to direct its mind to the merits of the grievances the Board might direct the union to reconstitute a Union Committee and reprocess the grievances under the terms of section 9 of the collective agreement. On reconsideration the decision might be made either to affirm the company's decision to discharge, to settle the grievances or to submit them to arbitration. The evidence indicates to the Board, however, that the positions of both the union and the company have been solidified over the six month period in question to make any resolution short of arbitration most unlikely. The company has repeatedly indicated that it does not intend to re-evaluate or modify its decision to discharge the two grievors. As well, the general membership of the union voted both on October 7, 1976 and Jan-

uary 6, 1977 to submit the matter to arbitration and has already appointed Mr. R. Sievers as its nominee. It is the opinion of this Board that a direction to the union to reprocess the grievances from the stage of establishing the Union Committee would occasion the repetition of considerations which have already been made by the union in good faith and in a non-arbitrary manner and would not have the effect of persuading either the company or the union to a position of compromise. The prejudice occasioned by further delays involved in remitting the grievances into the ordinary stream of the grievance procedure would not, in these circumstances, be counter-balanced by the prospect of a settlement short of arbitration.

38. Accordingly, the Board finds that a direction to the parties to arbitrate forthwith the grievances will most effectively remedy the violation of the Act. This order is made notwithstanding either the possibility that the Union Committee may not yet have fulfilled its section 9 duty under the collective agreement or the possibility that the Union Committee has already in fact confirmed the employer's decision to discharge the grievors. The order therefore overrides the collective agreement in that [1]it dispenses with the requirement of the parties to proceed through the Union Committee stage as set out in section 9 of the collective agreement in order to advance to arbitration and [2]it nullifies the effect that section 9 might have in preventing a grievance from proceeding to arbitration if it be found that the Union Committee has properly confirmed the company's decision to discharge the grievors.

39. In the event that the grievances are successful at arbitration, the Board orders that the union pay the compensation covering the period of time occasioned by the union's violation of section 60. The board takes the view that the union's violation of section 60 began on September 3, 1976 with the meeting between the company, the Union Committee and Mr. Shaw, and that it is being remedied by this decision. Thus if the grievances of either Mr. Murphy or Mr. Shaw are successful the Board orders that the union bear the responsibility for their compensation from September 3, 1976 to the date of this decision.

40. Because of the inherent conflict of interest resulting from the Board's contingent order of damages against the union, the Board further orders that the union be required to engage counsel, jointly chosen by the grievors and the union, to represent the union in the arbitration of the grievances of both Mr. Shaw and Mr. Murphy. While the Board has complete confidence in the union's present intention and ability to represent the grievors in good faith, justice demands that the grievors be protected against the apparent conflict of interest.

41. The Board remains seized of this complaint to resolve any matter arising out of the interpretation of its order.

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**0645-76-U** Keith Sutherland, [Complainant], v. The Ontario Municipal Employees Retirement Board, [Respondent], v. Canadian Union of Public Employees, Local 1923, [Intervener] .

**Section 79 – Discharge for Union Activity – Whether Board will defer to arbitration where alleged employer misconduct also a breach of collective agreement – Effect of failure of board of arbitration to consider grievance on the merits – whether Board will reconsider deferral.**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members J.D. Bell and A. Hershkovitz.

**APPEARANCES:** *H. Goldblatt, G.E. Snedden and K. Sutherland for the applicant; James Hassell, Michael Beswick and A.W. Reeve for the respondent; no one appeared for the intervenor.*

**DECISION OF VICE-CHAIRMAN PAMELA C. PICHER AND BOARD MEMBER A. HERSHKOVITZ:** March 28, 1977

1. By letter dated January 3, 1977 a request was filed on behalf of the complainant for the Board to reconsider its decision of October 21, 1976 to defer to arbitration in the matter raised by Mr. Sutherland's complaint filed under section 79 of The Labour Relations Act. The parties agree that given the circumstances and information presented to the Board at the original hearing, the Board's decision to defer was in direct accord with established Board practice. The request for reconsideration is based rather on the occurrence of a subsequent event: the outcome of the arbitration hearing to which the Board had deferred.

2. The grievance was heard before the Board of Arbitration on October 1, 1976. The grievance was dismissed with the finding of the majority that it was not arbitrable. That Board found that the grievance which was signed by Mr. Sutherland and another grievor had been wrongly submitted as a policy grievance and should instead have been submitted as two individual grievances. From its reading of the collective agreement the Board of Arbitration concluded that the grievance procedure established two mutually exclusive procedures and that because the grievors had committed themselves to the wrong procedure [policy v. individual] the Board was precluded from hearing the case on its merits. The Board concluded, in other words, that the clear language of the collective agreement prevented it from relieving the grievors from their error of form.

3. At the original hearing of Mr. Sutherland's complaint on September 9, 1976, this Board deferred to arbitration at the request of the respondent company. Although counsel for the complainant mentioned the possibility of the employer raising a timeliness objection at arbitration, the Board suspected that it would probably not preclude Mr. Sutherland's complaint from being heard on the merits.

4. The Board was concerned, however, that the withdrawal of the grievance from arbitration immediately prior to the Board's hearing on September 9, 1976 might form the substance of a successful preliminary objection to arbitrability. To meet the possibility that such an objection might prevent Mr. Sutherland's complaint from being heard on the merits, the Board solicited an undertaking from the employer that it would not raise the withdrawal as a preliminary objection.



5. In deferring to arbitration, therefore, the Board felt assured that Mr. Sutherland's complaint would be heard on its merits. No mention was made at the hearing of the technical defect in the form of the grievance. Indeed, if the Board had been aware of the fatality of the error in form and aware that the employer intended to raise the error as a preliminary objection, the Board would not have deferred to arbitration.

6. It is with the aim of reinforcing the arbitration process that the Board has developed the practice of deferring to arbitration. The Board has a deep interest, however, in insuring that alleged violations of the Act are resolved, and thus, as is evident from the numerous exceptions to the practice of deferral, it is only when assured that the arbitration process can adequately resolve the alleged violation of the Act that the Board will defer. The following excerpt from the Board's decision in *Collingwood Shipyards Ltd.*, [1976] OLRB Rep. July 376 is descriptive of the Board's position that in deferring to arbitration it does not intend to leave alleged violations of the Act unresolved. In deciding to defer to arbitration the Board said:

"... if the arbitration board finds on the evidence that it is without jurisdiction to deal with the matter, as the complainant suggests may happen, then in such circumstances, this Board may ... entertain this complaint ..."

7. Mr. Sutherland filed a complaint under section 79 of the Act alleging a violation of section 58 of the Act. In view of the "no discrimination" clause in the collective agreement and in view of the undertaking given by the respondent, the Board anticipated that the alleged violation of The Labour Relations Act would be fully resolved on the merits through the arbitration process. Because the majority of the Board of Arbitration found that the error in form rendered the grievance inarbitrable, neither the alleged violation of the collective agreement nor the alleged violation of The Labour Relations Act has been heard on its merits. This Board has no interest in, nor power to, sit on appeal from decisions of a Board of Arbitration. It does, however, have a duty to insure that legitimate allegations of a violation of its Act are resolved. It is contrary to the scheme of the Act to allow a defect in form or technical irregularity to thwart the full and open hearing of an alleged violation of the Act. As is evident from section 103 of the Act ["No proceedings under this Act are invalid by reason of any defect of form or any technical irregularity and no such proceedings shall be quashed or set aside if no substantial wrong or miscarriage of justice has occurred."], the Legislature has recognized that it is in the best interests of a continuing bargaining relationship to avoid, whenever possible, the frustration which results from a defect in form precluding the substance of a complaint from being heard.

8. Accordingly, because the merits of the complainant's alleged violation of The Labour Relations Act were not heard at arbitration the Board, in revision of its original decision to defer to arbitration, will hear Mr. Sutherland's complaint.

9. The matter is referred to the Registrar. In view of the fact that no evidence has been heard, the Board takes the view that it is not seized of this matter.

#### **DECISION OF BOARD MEMBER J.D. BELL:**

I disagree with the decision of the majority to now revoke the dismissal of Mr. Sutherland's complaint issued on October 21, 1976.

The ruling of the Board that the complaint be dismissed and the matter be dealt with by a Board of Arbitration in accordance with the terms of the collective agreement was a fully reasoned decision and I was then and still am in complete agreement with it and the reasoning expressed in it.

There are no new facts or circumstances alleged since the filing of the grievance. But now the complainant, Mr. Sutherland, wants us to revoke our decision and hear it because the collective agreement was not interpreted in his favour by the Board of Arbitration.

There has been no question concerning the jurisdiction of the Arbitration Board and its decision was based solely on its interpretation of the collective agreement.

Therefore, in my opinion, this matter is *res judicata* and for The Labour Relations Board to now rule that because the merits of the grievance were not heard it will revoke its earlier decision and hear the complaint can only be considered to be sitting in appeal of the arbitration ruling.

I would dismiss this request for reconsideration.

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**1738-76-U** Donna Hewitt [Employee], [Complainant], v. Employees Committee representing employees of Bauer Bros. Company [Canada] Brantford, Ontario, [Respondent].

**Section 79 – Duty of Fair Representation – Trade Union – Whether employee association a trade union – Whether association subject to duty of fair representation.**

**BEFORE:** Donald D. Carter, Chairman.

**APPEARANCES:** *Lorne Charlick and Donna Hewitt for the complainant; Walter R. Stevenson, Maxwell Cole and Tom Novak for the respondent.*

**DECISION OF THE BOARD:** March 31, 1977

1. This is a complaint under section 79 of the *Labour Relations Act* alleging that the respondent has acted contrary to the provisions of section 60 of the Act by not representing the complainant properly.

2. The complainant had been an employee of Bauer Bros. Company [Canada] Ltd. for twenty-one months until she was discharged on December 23, 1976. The evidence indicated that she was not experiencing any difficulty in her employment relationship until she requested a raise in July of last year. Apparently, in the middle of August, she was informed by her foreman that she would be fired. The actual discharge took place about a month later, on September 13th, at which time she was told that she was fired because she couldn't "comprehend her work". Following her dismissal, the respondent filed a grievance on her

behalf, and even went so far as to ask the other employees for donations so that they could finance an arbitration. The company then reconsidered the matter of discharge and agreed to reinstate the complainant, but only on a probationary basis. Once the probationary period had been completed, the company dismissed the complainant. The complainant then contacted the chairman of the respondent, Max Cole, who indicated that little could be done for her. Subsequently, she filed the complaint that is now before the Board.

3. Following the inquiry by the Board's labour relations officer, however, the respondent filed a grievance on behalf of the complainant. A meeting was held with the employer but the matter was not resolved. On February 2nd, a hearing was convened by this Board, and then adjourned *sine die* in order to allow the grievance to be processed further. Apparently, a further meeting was held between the respondent and the employer on the following day. This meeting was held in the absence of the complainant who had indicated that she would be unable to attend at that time because she could not afford to take any more time off from the job that she now holds. After that meeting, she was informed by Max Cole that her grievance had not been allowed by the employer. Subsequently, she was informed by Cole that the respondent would not take her grievance to arbitration.

4. The respondent raised, as a preliminary objection, the argument that the respondent, because of its inadequate organizational structure, was not what this Board would consider to be a trade union. Since trade union status was lacking, the respondent argued that the duty of fair representation imposed by section 60 of the *Labour Relations Act* did not apply to it.

5. The evidence in support of this argument established that the respondent, although it was formed approximately ten years ago, still did not have any constitution, nor did it have any members as such. The respondent was run by a four-person committee elected by the hourly-rated employees. Apparently, elections were held periodically, usually after the previous committee had exhausted its mandate by negotiating an agreement with the employer. Business was conducted by the respondent through general meetings of all employees, such meetings being held two or three times each year. The respondent did not collect membership dues but, rather, depended on financial donations from the hourly-rated employees.

6. Despite this inadequate organizational structure, however, the respondent did purport to represent the hourly-rated employees in bargaining with the employer. Negotiations were carried on periodically between the respondent and the company, and these negotiations culminated in "agreements". The most recent agreement, running from January 1, 1976 to December 31, 1977, provided that "the company recognizes the employees committee as the sole bargaining agent for all hourly-rated employees, except students, in its Brantford, Ontario, plants".

That agreement, moreover, contained a no-strike and no-lockout provision. Also contained in the agreement were provisions establishing a grievance procedure, and arbitration conditional upon mutual agreement of all parties. It is clear, therefore, that the respondent, despite its very loose organizational structure, was purporting to act as a trade union.

7. This is not an easy case to resolve. On the one hand, the Board is faced with an organization, the structure of which does not meet the standard imposed by the Board. As



the Board has stated in the *Dufferin-Peel Roman Catholic Separate School Board* case, [1976] OLRB Rep. Dec. 821:

5. The Labour Relations Act in section 1[1] [n] defines a trade union, in part, as “an organization of employees formed for purposes that include the regulation of relations between employees and employers ...” For an association of employees to fit within the term “organization of employees” as that term is used in the Act, the Board requires that it have an existence separate and apart from its individual members and that such a separate existence be evidenced by a written constitution. [See: *The Elgin County Roman Catholic Separate School Board*, [1970] OLRB Rep. Feb. 1352.] The existence of such a constitution ensures that the organization is a viable entity and also that prospective members will have an opportunity to inspect the constitutional provisions governing its purposes, organization and conduct prior to determining whether or not they wish to take out membership in the organization [See: *Gulf Oil Canada Limited*, [1973] OLRB Rep. May 256.

8. On the evidence, it is clear that the respondent does not possess any existence separate and apart from its individual members that is evidenced by a written constitution. Nevertheless, the respondent is purporting to act as though it were a separate entity, and it is representing the employees in bargaining with the employer. Of concern to the Board is the question of whether the respondent, having purported to act as a trade union, can now claim to be something less than a trade union in order avoid the obligation imposed by section 60 of the Act.

9. The Board, although it is reluctant to do so, must conclude that the respondent does not possess the necessary organizational structure to be considered a trade union. As a result, the complaint does not fall within the purview of section 60 of the *Labour Relations Act*. The complainant, although she has clearly received inadequate representation, cannot obtain a remedy from this Board. The fact is that the respondent is not a trade union, and the relationship between the respondent and the employer is not a collective bargaining relationship. Because of these facts, even if we were to estop the respondent from pleading that it was not a trade union and proceeded to apply section 60, it is very doubtful whether the Board could give any effective remedy in view of the respondent's inability to provide even a minimal standard of representation for the employees that it purports to represent. Thus, even if we were to order the respondent to pursue further the complainant's grievance, a grievance which appears to have some merit, it is extremely unlikely that this order would achieve the desired result.

10. Accordingly, this complaint is dismissed.

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**1983-76-U** Croven Limited, [Applicant], v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1090, [Respondent].

**Collective Agreement – Strike – Duty to Bargain in Good Faith – Whether collective agreement silent with respect to anti-inflation legislation survives a rollback – Whether threatened strike following rollback is unlawful – Effect of good faith bargaining requirement.**

**BEFORE:** Kevin M. Burkett, Vice-Chairman.

**APPEARANCES:** *M. Brian Keller for the applicant; Lennox A. MacLean, Steve Nimigon and Al Green for the respondent.*

**DECISION OF THE BOARD:** March 16, 1977

1. This is a request filed under Section 82 of the Act for a declaration from the Board that the respondent union is threatening an unlawful strike and a direction from the Board that such threats cease.
2. The relevant facts which are agreed between the parties can be summarized as follows:
  - [i] The parties commenced to bargain for a renewal agreement in April, 1976 and in the course thereof requested the appointment of a conciliation officer.
  - [ii] The parties received the “no-board” report from the Minister dated May 21, 1976.
  - [iii] The parties entered into a Memorandum of Settlement for a two year period effective from June 2, 1976, which although not calling for ratification was subsequently ratified by the union and implemented in full by the company.
  - [iv] The Anti-Inflation Board by letter dated August 23, 1976 directed that the compensation package be rolled back by 5.6% in the first year and .34% in the second.
  - [v] The Anti-Inflation Board by letter dated February 2, 1977, in response to the appeal of the union confirmed its August 23rd ruling including the requirement for “recapture”.
  - [vi] Following receipt of the February 2nd confirmation of the roll-back the company advised the union of its desire to comply with the A.I.B. directives and to implement the procedures which it had proposed on September 8, 1976, thereby precipitating the alleged strike threats.

The parties are also agreed that the company initially took the position in bargaining that it could offer no more than that permitted under the A.I.B. compensation

guidelines. Subsequently the company was persuaded to offer an amount in excess of the arithmetic guidelines in order to secure a memorandum of settlement. Both parties were aware that the Anti-Inflation Act itself and the practice of the A.I.B. have in certain circumstances permitted compensation payments in excess of these numerical guidelines; however the parties were also aware that the compensation package to which they had agreed might be rejected by the A.I.B. and that the "guideline" would, in effect, become a "ceiling" which they were not permitted to exceed. The parties are further agreed that in the face of its offer of an amount in excess of the guidelines the company proposed language dealing with the eventuality of an A.I.B. roll-back. The proposed language was rejected by the union and in the final analysis the company signed a memorandum without reference to the effect of an A.I.B. roll-back. It is important to emphasize that the determination in this matter relates to a Memorandum of Settlement which makes no reference to the agreement of the parties in respect of a possible A.I.B. roll-back.

4. The Board has reviewed the evidence in respect of the alleged strike threats and has satisfied itself that the respondent trade union threatened to strike the applicant company subsequent to entering into the June 2, 1976 Memorandum of Settlement. The trade union made these threats after receiving the February 2, 1977 confirmation from the A.I.B. when it indicated that it was prepared to strike in support of its proposals for a revised agreement. The legality or illegality of the threat and the strike if it occurs, depends upon the existence or lack thereof of a collective agreement. The company argues that the memorandum signed by the parties on June 2, 1976 which has been implemented in full, is a collective agreement which must be enforced through the grievance and arbitration procedures and which serves as a bar to a legal strike during its term. The essence of the union argument, on the other hand, is that the A.I.B. roll-back, going as it does to the total compensation package, is not severable from the remainder of the agreement and consequently the whole agreement must be found to be null and void and hence not a bar to a lawful strike. The union submits that a document embodying terms substantially different from those which had actually been agreed upon, could not be construed as their agreement. Counsel for the union argued that the parties must be free to bargain a new agreement on the same basis as the original; that is under the duty imposed by Section 14 of the statute and with the freedom to resort to economic sanction, if necessary. The task of this Board is to determine, in the face of the A.I.B. roll-back, if there exists a collective agreement as would serve as a bar to a legal strike and thereby cause the Board to declare that the strike threats made by the union were unlawful.

5. There exists an uneasy relationship between the administration of the various Canadian Labour Relations statutes, both Provincial and Federal, and the administration of the Federal Anti-Inflation Act. The Labour Relations statutes are designed to provide a system of free collective bargaining between employers and trade unions. Under this system, wage increases, fringe benefits, and all other terms and conditions of employment are the subject of negotiation between an employer and a trade union. The produce of these negotiations is a collective agreement, the terms of which are determined primarily by restraints that operate within our economy – restraints that may be measured and tested by resort to the strike or lock-out. The Anti-Inflation Act, on the other hand, has as its purpose the containment of inflation, through governmental restraint of profit margins, prices, dividends, and, most importantly for the purposes of this case, compensation. Governmental restraint of compensation, however, is a goal that in many respects is incompatible with the intent of collective bargaining legislation. Despite the apparent incompatibility, however,



the co-existence of wage controls and collective bargaining is a fact of life. The Federal Anti-Inflation Act is in force, is being administered, and is clearly constitutional. Concurrently, Federal and Provincial collective bargaining statutes are in force, are being administered, and are accepted as being constitutional. The co-existence of wage controls and collective bargaining has been expressly recognized by the Anti-Inflation Board. In its statement on compensation dated November 7, 1975 the Board, among other things, stated:

"It is not the intention of the Board to replace the collective bargaining or other processes by which compensation is determined. It is expected that the parties will negotiate in good faith with a view to concluding agreements under the guidelines."

6. Notwithstanding these words from the Anti-Inflation Board there are obvious inconsistencies between a system of governmental economic controls and a system of free collective bargaining. Such inconsistencies cannot be ignored since the concurrent administration of these two quite different schemes gives rise to very real and immediate problems, such as the one before this Board. The unenviable task of reconciling these two schemes has, in the main, fallen to Labour Boards. This allocation of responsibility may be explained by the fact that any conflict between the two schemes appears to manifest itself in a collective bargaining problem. Once the collective bargaining problem appears, the natural reaction of those persons affected is to turn to a Labour Board for the solution. The Labour Board is then faced with the problem of fashioning a remedy that is consistent with both the collective bargaining statute that it administers, and with the external Anti-Inflation legislation. It goes without saying that a Labour Board has a primary duty to fashion a labour relations remedy consistent with the legislation which it administers. The requirement that the solution also be consistent with the Anti-Inflation legislation has two roots. Firstly, there is the common sense principle that the enforcement of one statute should not result in the breach of some other statute. This point was made quite clearly by the Canada Labour Relations Board in the *Cyprus Anvil* case [76 CLLC 16,305] when it stated:

"It is clear that the Canada Labour Relations Board cannot ignore the provisions of the *Anti-Inflation Act* and the regulations made thereunder in interpreting and applying the provision of the *Canada Labour Code* [Part V – Industrial Relations]. Failing that, an employer could be compelled under the *Canada Labour Code* to do something which is illegal under the *Anti-Inflation Act*. Since Parliament could obviously not have intended such an outcome, the provisions of the *Canada Labour Code* must be reconciled, if at all possible, with those of the *Anti-Inflation Act*. Unless this is possible, it would appear that the provision of the *Anti-Inflation Act* must prevail."

This statement leads into the second reason why the Anti-Inflation Act must take precedence over the provincial labour relations statutes. Constitutionally, valid provincial legislation must give way to valid federal legislation where there is any conflict between the two statutes. This principle of the constitution was recognized by the Labour Board of British Columbia in the *Pacific Press* case, [76 CLLC 16,402], when it stated:

"... The *Anti-Inflation Act* has been enacted by the Parliament of Canada. Its validity has been upheld by the Supreme Court of Canada. As a Federal

Statute, it is constitutionally paramount to Provincial Labour Laws and collective agreements which have been arrived at under that law. Unmistakably, this Board cannot direct an employer to perform acts which would place that employer in breach of the *Anti-Inflation Act*.”

Applying this approach, any incompatibility between a provincial statute and a federal statute is resolved in favour of the federal statute.

7. For both the reasons set out above the collective bargaining statute must give way to the wage control statute when there is an irreconcilable conflict between the two. It must be emphasized, however, that in view of the constitutionality of both pieces of legislation and their concurrent operation, this occurs only when there is a fundamental incompatibility between the two. The major question facing a Labour Board, therefore, when dealing with a collective bargaining problem arising out of the Anti-Inflation program, is to determine whether there exists a sufficient incompatibility between the collective bargaining legislation and the Anti-Inflation legislation to justify a refusal to apply the obvious collective bargaining solution. Determining the extent of the incompatibility is made more difficult, however, by the conflict of responsibilities that faces a Labour Board when dealing with this type of problem. As stated the primary responsibility of a Labour Board is to administer collective bargaining legislation, giving to it an interpretation that is consistent with the terms of the statute, the intention of the legislature and the realities of the collective bargaining process. A collateral responsibility, and one that has also been mentioned earlier, is to ensure that the collective bargaining process operates in a manner that is in accord with the general law of the land. The troublesome question concerns the point at which a Board's primary responsibility must give way to this collateral responsibility. This point is reached when the Labour Board concludes in any given situation that the two types of legislation cannot be reconciled. The initial thrust must be at reconciliation. Taking this approach the collective bargaining statute can, on a proper construction, survive and co-exist with the Anti-Inflation statute. In certain situations, however, the primary responsibility of a Labour Board must give way since the fundamental incompatibility of the statutory prescriptions may force a Board to conclude that the collective bargaining solution is inappropriate. It is only after attempting to reconcile them, however, that the Anti-Inflation legislation overrides the labour relations solution.

8. Collective bargaining is an exercise which requires the respective parties to make trade-offs as between a broad spectrum of negotiable items ranging from management rights and job security to the application of seniority provisions and to the payment of wages, fringe benefits and other forms of direct and indirect compensation.

A freely negotiated agreement reflects the priorities of the respective parties having regard to the economic [both macro and micro] and legislative realities. It goes without saying, however, that the primary considerations upon which a trade union enters into a collective agreement is the compensation package offered by the employer. The compensation package in large measure determines the trade-off pattern as between it and the other elements of the agreement. In the instant case the parties entered into an agreement which embodied their freely determined understanding as to the terms and conditions of employment which would be provided by the employer and accepted by the employees for the two year period commencing June 2, 1976. There is no doubt that the parties were *ad idem* on the terms and conditions embodied in their memorandum of settlement so that, apart altogether from the



legal effect of that document it embodied 'their agreement'. Following settlement the Anti-Inflation Board notified the company that it would approve an increase of 8% in *total compensation* for the first guideline year commencing June 1, 1976 and a further 6% in total compensation in the second guideline year commencing June 1, 1977. The company was in effect directed to roll-back the first year compensation package by 5.6% and the second year compensation package by .34% and to make arrangements to recover the overpayments which had been paid since the agreement had been put into effect. The Anti-Inflation Board confirmed its original decision by letter dated February 2, 1977. The employer has notified the trade union that it intends to abide by the A.I.B. ruling and the trade union has in turn sought strike authorization and threatened to strike in the face of proposed unilateral employer action. It falls to the Board to consider the effect of the A.I.B. compensation roll-back on an existing collective agreement which *has not provided for the eventuality of such a roll-back*.

9. The Labour Relations Act of Ontario defines a collective agreement as follows:

“‘collective agreement’ means an agreement in writing between an employer or an employers’ organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers’ organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers’ organization, the trade union or the employees.”

Notwithstanding the form of the document the fundamental requirement is that it be an “agreement”. [See *Graphic Center* case, [1976] OLRB Rep. May 221, for a review of the Board jurisprudence as it relates to the existence or lack thereof of a collective agreement]. The primary purpose of the statute is to facilitate *free* collective bargaining between the parties which by its very nature must allow resort to economic sanction as a means of securing agreement. The legislature has recognized that in a free society it is imperative that individual workers be permitted to join together and freely negotiate their terms and conditions of employment. Concomitantly, however, the legislature has had to balance the exercise of individual and collective rights and freedoms against the need for stability and the maintenance of industrial peace. The balance has been struck in the “no strike/lockout” provision of the Act. Once having freely entered into a collective agreement the statute requires the parties to abide by its terms for the period of its duration and to submit any dispute as to its application, interpretation or administration to binding arbitration. The parties are prohibited from resorting to economic sanctions during the term of their agreement. Whereas the parties are free to resort to economic sanction as a means of compelling agreement the statutory *quid pro quo* is a prohibition of the resort to economic sanction as a means of enforcing the agreement. In the instant case the employer argues that the trade union is prohibited from resorting to strike and must seek a remedy at arbitration. In *Port Arthur Shipbuilding Co. v. Arthurs et al* [1967] 67 CLLC 104 [at page 107] Schroeder J.A. described the role of arbitrators as follows:

“[arbitrators] have no right to make contracts for the parties; that their province is to interpret contracts and not on any arbitrary principle or by presumptions to nullify the clear intention of the parties as expressed in words deliberately chosen by them to govern their employer-employee relationship



and set out in a formal contract which is more frequently than not the consummation of protracted and arduous bargaining on both sides.”

In this case of course, the arbitrator would be faced with a fundamental difficulty. If asked to enforce the agreement embodied in the June 2 memorandum he would be forced to defer to the ruling of the A.I.B. vis-a-vis this agreement. If, on the other hand, the employer is allowed to alter that agreement so as to conform with the ruling of the A.I.B. an arbitrator when called upon to interpret the altered agreement would be dealing not with “the clear intention of the parties” but with the unilateral determinations of one party.

10. In the face of the roll-back order and its subsequent confirmation it is clear that the negotiated compensation package cannot legally stand nor can it be enforced under the arbitration provisions of the collective agreement. The Anti-Inflation Board has ruled that the negotiated compensation package is illegal under the Anti-Inflation Act. The Anti-Inflation Board has not, however, directed that specific modifications of the package be made, rather the A.I.B. has considered the overall impact and has referred the matter back to the company. Does this mean that the employer is free to unilaterally determine the manner in which the compensation package will be modified and thereby as a consequence undermine the primary purpose of the Labour Relations Act? Is the trade union compelled to live for two years under the terms of a document which will not reflect an agreement of the parties? The Board must give an unequivocal “no” to both of these rhetorical questions. In the circumstances of this case the labour relations legislation can operate in harmony with the law of the land. The obvious labour relations solution which flows from a collective bargaining assessment of the impact of a compensation roll-back does not subvert the federal statute nor does it require either of the parties to this matter to act in a manner inconsistent with the federal statute.

11. A compensation package found to be illegal cannot be severed from a collective agreement without destroying the basis upon which the agreement was concluded [see paragraph 8 herein]. The Canada Labour Relations Board considered this same issue in re *Cyprus Anvil* [supra] and also concluded that within the context of a collective agreement a compensation package found to be illegal could not be severed without destroying the entire agreement. The Canada Board stated:

“An entire collective agreement will not necessarily be pronounced null and void because one of its provisions may be illegal or against public policy. It is particularly important to avoid such a drastic result since collective agreements are normally complex contracts containing numerous stipulations on any number of ‘terms or conditions of employment’. The nullity of a collective agreement could have drastic consequences for the employer, the bargaining agent and the employees affected. If the faulty provision can be considered as ‘separate’ or ‘distinct’ from other provisions of the agreement, common sense dictates that only the faulty provision should be found null and void. In such a case, one might infer that the parties would have wished the collective agreement to stand, even if they had been aware that this particular provision would have to be deleted. Similarly, the common law of contracts would invoke the principle of ‘severability’.

In the instant case, however, the problem cannot be so readily resolved. It is not solely the validity of a particular provision of the collective agreement which is in question but that of the whole 'compensation package' on which the parties agreed. ...

There is no doubt that the wage scale or salary schedule is always a most crucial feature of any collective agreement. However, it must be noted that the *Anti-Inflation Act* and the ruling made by the AIB pursuant to the Act does not affect solely the wage scale agreed upon between the parties but all provisions of the agreement which determine the 'compensation' of employees. Section 2[1] of the *Anti-Inflation Act* defines 'compensation' as follows:

'compensation' means *all forms of pay, benefits and perquisites paid or provided, directly or indirectly, by or for the benefit of an employee.*

Therefore, what is at stake here is the validity of practically all the provisions of the collective agreement which have monetary or financial implications."

It is the compensation package which is at the center of the bargaining process and accordingly the implications of a compensation roll-back go beyond the financial and economic provisions of the contract. The effect is to undermine the very basis upon which the parties have entered into their "agreement" and to thereby render it something other than a collective agreement within the meaning of section 1[1] [e] of the Labour Relations Act. The Canada Board concluded, as does this Board, that the compensation package cannot be severed from the agreement. [See also re *Attwood v. Lamont* [1920] 3KB 571, *Kearney v. Whithaven Colliery Co.* [1893] 1QB 701 at page 711, *Pauze v. Gauvin* [1954] S.C.R. 15 at page 26 and *AG. for B.C. v. Brooks Bidlake etc.* [1922] SCC Vol LXIII 467 at page 480]. The effect of the roll-back is to render the document null and void. In the face of the A.I.B. ruling the document entered into by the parties can no longer be found to be a collective agreement within the meaning of the Labour Relations Act. It no longer embodies the freely negotiated "agreement" of the parties from which flows the rights arbitration and strike prohibition sections of the Act.

12. The Board is compelled to find that there does not exist between the parties to this matter a collective agreement within the meaning of section 1 [1] [e] of the Labour Relations Act as would serve as a bar to a strike or lockout. Whereas the parties were in agreement, the ruling of the A.I.B. with respect to the compensation package has destroyed the basis upon which the agreement was concluded. A ruling under the Federal Statute has undermined the existence of what was, under the provincial statute, a collective agreement. The result is to return the parties to an equal footing from which they can negotiate a new agreement which will be both a collective agreement within the meaning of the Labour Relations Act and as well an agreement which meets the requirements of the Anti-Inflation Act. It is this new agreement, yet to be negotiated, which will breathe life into the statutory strike/lockout prohibition as it relates to the parties before us.

13. The parties must now return to the bargaining table informed as to the precise requirements of the Anti-Inflation legislation and negotiate an agreement which reflects the reality of the federal constraint. Collective bargaining is carried on within a maze of legislative constraints [i.e. employment standards legislation, occupation health and safety legisla-

tion, labour relations legislation] which supercede the freedoms otherwise enjoyed by the parties. Having regard to these constraints it is understood that the duty imposed by Section 14 of the Labour Relations Act does not permit resort to economic sanction in pursuit of unlawful or illegal demands. The parties to collective bargaining are required to conduct themselves according to the legislative realities and it follows that the parties to this particular dispute must now negotiate having regard to the specific ruling of the Anti-Inflation Board. The agreement which results from these negotiations will not only be consistent with the requirements of the Anti-Inflation Act but it will also be achieved without abrogation of the freedoms and responsibilities embodied in the Labour Relations Act. The two pieces of legislation can, in the circumstances of this case, be reconciled to a degree which maintains the intent and purpose of each.

14. Having regard to all of the foregoing this application is dismissed.

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**2025-76-U** Ferranti-Packard Limited, (Applicant), v. United Steelworkers of America, Local 5788, and J.C. Adams et al, (Respondents).

**Collective Agreement – Strike – Whether signed memorandum of settlement a collective agreement – Whether terms sufficiently identified – Effect of agreement specifically contemplating rollback and method of implementation – Whether agreement survives rollback.**

**BEFORE:** Donald D. Carter, Chairman.

**APPEARANCES:** *D.I. Wakely and E.J. Bates for the applicant; Lorne Ingle and Henry Duffy for the respondents.*

**DECISION OF THE BOARD:** March 17, 1977

1. This is an application brought under section 82 of the *Labour Relations Act* seeking a direction to prevent the continuation of a work stoppage at the applicant's plant on Dieppe Road in St. Catharines.

2. Two issues of some significance arise out of this application. First, there is the problem of identifying the point at which negotiations evolve into a collective agreement, so as to raise a bar against the further use of economic sanctions. The second issue arises only if a determination is made that negotiations have become finalized in the form of a collective agreement. The issue, then, is whether a collective agreement which expressly contemplates a roll-back by the Anti-Inflation Board can survive after a request is made by the Anti-Inflation Board to reduce the total compensation increase in that agreement.

3. In order to resolve these issues it is first of all necessary to examine the conduct of negotiations by the two principal parties to this dispute. The applicant and the respondent union had been parties to a collective agreement that was in operation from February 25, 1975 to February 25, 1976, covering employees at the Dieppe Road plant. Notice of desire to bargain was given by the respondent union well before the expiry of that collective agree-



ment, being given on October 24, 1975. There followed lengthy negotiations between the two parties, a total of thirty-two negotiation meetings being held.

4. These negotiating meetings, however, did not result in a collective agreement and, on July 9, 1976, the respondent union and its members commenced a legal strike. The strike continued until approximately September 10, 1976. Just prior to the termination of the strike, on September 8th, the parties executed a document labelled "Memorandum of Agreement". This document consisted of ten pages. Each page was initialled by the applicant's chief negotiator, E.J. Bates, and the union's chief negotiator, H. Duffy. The final page contained the signatures of both Bates and Duffy and, in addition, the signatures of two other company officials and three other union officials.

The first page, according to Bates' testimony, constituted a summary of agreed-upon changes to the language of the previous agreement. Bates testified that each item on this list referred to a written document that had received the approval of both parties during the negotiations. For example, the reference to "31.01" indicated that there was in existence a document amending that provision of the previous agreement, dealing with the duration of the agreement. According to Bates, that document provided for the collective agreement to run from February 25, 1976 to February 24, 1978. This document, however, was not introduced in evidence and, under cross-examination, Bates admitted that it was unlikely that this document had been either signed or initialled by the parties. The fact is, then, that the only signed written agreement relating to these language changes was the summary contained in the first page of the Memorandum of Agreement. That summary read as follows:

**All language changes agreed to:**

**Appendix E (example of Union dues deduction)**

2.01(b)	10.07(a)
3.05	10.08(a)
3.06	10.08(c)
7.01	Single arbitrator for incentive grievances; both
10.05 (c)	parties to agree to names of arbitrators acceptable.
10.05 (f)	11.02
10.05 (g)	16.02(a)
10.06	16.02(b)
10.06 (a)	31.01
10.06 (c)	

Methods and Time Standards sheets dated July 1, 1976 – accepted July 6, 1976.

6.01 (c)

8.01 (d)

Letter of intent re contracting in 3.01 (b)

Appendix B (4)

Letter of intent re preferential job consideration for medical reasons

Letter of intent re administration of Article 11.09

Explanation of LTD booklet page 6 (d) & (h)

Letter of intent re seniority

11.04 (b)

20.01

Grievance procedure  
Mechanic "D" – deleted

6. The second and third page of the Memorandum of Agreement dealt with the settlement of a number of outstanding grievances. Those grievances were identified and their disposition noted. On the fourth page of the document, two matters were dealt with in some detail, leaving little doubt that the parties had reached a written agreement on these matters.

7. The important item of monetary benefits was set out in the latter part of page four and continued to the end of page five. One item on page five had been altered, and initialled by Bates. This alteration was made, according to Bates, after he had been informed by Duffy that there had been a typing error. The alteration simply changed the effective date for increasing the increment between job classes from February 27, 1976 to February 27, 1977. The monetary package was set out in the following terms:

**Monetary**

O.H.I.P. – liability increased to present level  
\$32.00 – dependent coverage  
\$16.00 – single coverage retro-active to May 1, 1976.

S & A – 66⅔ of basic weekly earnings to a maximum weekly benefit of \$135.00 per week for future claims.

LTD – \$120.00 per week for future claims.

Pensions – 1966 on – improved to \$7.00 mos. multiplied by the employee's years of credited service at the time of retirement.

*prior to 1966* – the excess, if any, of: \$6.00 multiplied by the number of completed years and months of an employee's continuance service from date of employment to and including July 2, 1966; over, the monthly pension benefit accrued to such employee's credit in accordance with the provisions of any other pension plan of the Company in respect to service prior to July 31, 1966.

*retirees* – \$10.00 month, not to include employees who retired after February 23, 1976.

These benefits effective February 24, 1976.

Vacations – 3 weeks after 5 years – 6% (1976)  
4 weeks after 15 years – 8% (1976)  
1977 – 6 weeks after 35 years – 12%

Shift  
Premium – add 5¢ for total of 25¢ per hour.

Safety  
Shoes – 50% paid per employee for 1 pair of shoes each six months

## Wages

1. Cola—non-operative for duration of contract
2. Roll in present 30¢ cost of living to both day rates and incentive base rate.
3. (a) Effective the beginning of the first regular pay period after ratification, job class 1 day rate = \$4.62
- (b) Effective the beginning of the first regular pay period after ratification, job class 1 incentive base \$4.27
- (c) Effective the beginning of the first regular pay period after ratification, increase the increment between job classes by 1¢, making the increment 9¢
- (d) Effective February 27, 1977 increase the increment between job classes by 1¢ making the increment 10¢
- (e) Effective February 27, 1977 increase the incentive base rate, job class 1, and the day rate, job class 1, by 36¢ per hour.  
 job class 1 day rate would be \$4.98  
 job class 1 incentive base rate would be \$4.63
- (f) Add 20¢ additional to day rates and 13¢ additional to base rates when approved by A.I.B. retro-active to February 24, 1976.
- (g) Add 20¢ additional to day rate and 13¢ additional to base rates effective February 27, 1977 if approved by A.I.B.

In 1977 a 35¢ drug plan to be implemented.

In 1977 a basic dental plan – 50% cost paid by Company and 50% cost paid by employee if approved by A.I.B.

8. The sixth page set out a procedure for job evaluation, absence without leave during Christmas holidays, and the situation of a G. LeFeuvre on long-term disability.
9. The seventh page dealt with retroactivity, providing “full retroactivity for all actual hours worked with incentive work calculated at the individual’s average inc. rate for the period from February 24, 1976 to implementation of the new rates”. There was also a provision that group insurance improvements were to be effective the first of the month following the date of ratification. Finally, there was a provision dealing with the retroactive effect of the COLA clause.
10. The eighth page of the document dealt with explanation of long-term disability benefits, the two paragraphs of explanation being set out in Bates’ handwriting.



11. Finally, the ninth and tenth pages contained three letters of intent, written in the hand of a Mr. Slade, a company official. The most important of these letters of intent was the final one dealing with the possibility of a roll-back by the Anti-Inflation Board. This provision was worded in the following terms:

The Company and the Union agree that if the A.I.B. alters the monetary package the parties will negotiate those items to be modified. Failing to implement a satisfactory solution within the required time limits, the Company will reduce the wage package to conform to the A.I.B.

12. The uncontradicted evidence of Bates was that this document had been ratified by the employees on September 10th. Following ratification, the applicant had increased wages, calculated and paid retroactive wages, and had instituted changes in the benefit plan. According to Bates, during the last six months, the applicant had treated the Memorandum of Agreement as amounting to a collective agreement and this position had not been contested in any way by the respondent union. In fact, the union had apparently filed grievances relating to matters dealt with in the Memorandum of Agreement.

13. This state of affairs continued until January 4, 1977, at which time the parties were advised by the Anti-Inflation Board that the settlement contained in the Memorandum of Agreement was in excess of the anti-inflation guidelines. The Anti-Inflation Board directed that the settlement be reduced and that certain monies be recovered from the employees. There then followed four meetings between the applicant and the respondent union with the purpose of negotiating an alteration of the Memorandum of Agreement in order to comply with the request from the Anti-Inflation Board. The final meeting occurred on March 2, 1977, and no agreement was reached at that time. Shortly after, on March 4th, a work stoppage occurred at the applicant's St. Catharines plant. It is this work stoppage that gave rise to the application now before the Board.

14. The position taken by the respondent union is that the work stoppage occurring on March 4th was a legal strike under the *Labour Relations Act*. The union argument was that the Memorandum of Agreement entered into on September 8th did not constitute a collective agreement, so that the March work stoppage did not occur in the face of a collective agreement. The essence of this argument was that the parties had never finalized their negotiations and, hence, the March work stoppage was no more illegal than the strike that had occurred in July and August of 1976. The first issue, then, is whether the negotiations between the parties had evolved into a collective agreement as defined by the *Labour Relations Act*.

15. Section 1, subsection 1, paragraph (e) of the *Labour Relations Act* defines a collective agreement as "an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents the employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees". This definition contemplates that a collective agreement does not arise until negotiations have concluded in an agreement, and this agreement is embodied in some form of document. Both the element of agreement and the element of writing are essential to the existence of a collective agreement. There may well be situations where, during negotiations, there has been an exchange of written documents by the parties, yet the element of agreement is lacking. In this kind of situation, the mere existence of written documents will not be sufficient to establish a collective agreement. See *Marsland Engineering Limited*, [1970] OLRB Rep. Apr. 133; and *Graphic Centre (Ontario) Inc.*, [1976] OLRB Rep. May 221. There may also be cases where the parties have concluded their negotiations and

reached agreement, yet that agreement has not been reduced sufficiently to writing in order to be identified. Again in these circumstances, it cannot be said that the parties have gone so far as to reach a collective agreement, the essential element of writing being absent.

16. In this case, the question is not whether the parties have reached agreement but, rather, whether they have sufficiently identified that agreement by reducing it into written form. The Board has no doubt that the Memorandum of Agreement executed on September 8th was intended to bring the negotiations to a conclusion. The question, however, is whether the executed document adequately identifies the terms of the agreement that was reached.

17. What then is the extent of writing required in order for an agreement to constitute a collective agreement? The Board has indicated, in previous cases, that the parties need not go so far as to execute a formal collective agreement in order to satisfy the requirement of writing. The more informal memorandum of settlement can constitute a collective agreement provided that it identifies all the terms that have been agreed upon by the parties to the negotiations. In other words, a collective agreement need not set out in full all terms and conditions that are the subject of the agreement. Rather, a more summary document, referring to separate documents, or other indicia of agreement, may identify sufficiently the terms of the agreement reached.

18. The requirement that all terms of the agreement be identified, however, means that if there are indicia of agreement that exist outside the document executed by the parties, then these indicia must be incorporated by reference into the executed agreement. The specific question faced by the Board in this case is whether a sufficient incorporation by a reference has occurred. Of specific concern is the first page of the Memorandum of Agreement listing in very summary form a number of agreed-to language changes. The most important of these references is the reference to Article 31.01, an article which in the previous agreement established the duration of that agreement. The references on page one clearly indicate that the parties have agreed to change the language of the particular provision set out on that page. Is it possible, however, for the content of that agreement to be identified? It is this question that caused the Board considerable concern at the hearing and, even upon reflection, it is not an easy question to answer.

19. There is no doubt in the Board's mind that the applicant and the respondent union did reach agreement on language changes to the articles of the collective agreement set out in page one of the Memorandum of Agreement. Moreover, it is also possible to ascertain the content of those language changes through the use of oral evidence. Is the use of oral evidence in this manner, however, inconsistent with the requirement that an agreement be in writing in order to constitute a collective agreement? The answer would appear to be no. The mere fact that a written document is ambiguous, and may require clarification through the use of oral evidence does not make that document any less a written document. The Board, therefore, can resort to extrinsic evidence, both oral and written, in order to resolve any ambiguities in the Memorandum of Agreement. The extrinsic evidence, however, must clearly identify the content of the collective agreement that has been set out in skeletal form in the Memorandum of Agreement. If it is impossible to flesh out the Memorandum of Agreement through extrinsic evidence, then it must be said that the parties have reached an agreement that falls short of the legal requirements for a collective agreement.



20. Extrinsic evidence was used by the Board in *Crestile Limited*, [1967] OLRB Rep. Apr. 41, a case cited by the respondent union in support of its position. In that case, a document was executed that was far from unambiguous in its terms, yet the Board resorted to evidence of the history of negotiating in order to identify the terms of the agreement. The same approach can be taken in the instant case. It is the uncontradicted evidence of the applicant that there are in existence written documents setting out the language changes referred to in page one of the Memorandum of Agreement. It is also uncontradicted that both parties have operated under the Memorandum of Agreement for a period of six months, indicating that the parties themselves do not appear to have had any problem in identifying the terms of their agreement. Our conclusion, then, is that the Memorandum of Agreement does sufficiently identify the terms agreed to by the parties so as to constitute a collective agreement within the meaning of the *Labour Relations Act*.

21. The finding that the Memorandum of Agreement constitutes a collective agreement leads to the second question of whether the presence of the *Anti-Inflation Act* has rendered this agreement inoperative. In this regard, the respondent union argued that, given the presence of the Anti-Inflation Board, the Memorandum of agreement must be characterized as merely a tentative letter of intent, intended to become a binding collective agreement only upon approval of the wage settlement by the Anti-Inflation Board or, in case of a roll-back, only when that roll-back was finally implemented through the procedure agreed upon by the parties.

22. This case is one of a number of cases that have confronted this Board with the problem of having to reconcile two quite different legal structures governing employer-employee relations in this province. At one pole, there is the provincial collective bargaining law set out in the *Labour Relations Act* and, at the other, there is the system of income restraints set out in the federal *Anti-Inflation Act*. These two statutes serve quite different purposes – purposes that at times may be in conflict. Labour boards, just as much as the parties themselves, often find themselves caught in the middle between these two opposing forces. It must be recognized, however, that labour boards, being established to interpret and administer the respective collective bargaining statutes, have a primary duty to fashion a labour relations remedy consistent with their own statute. Nevertheless, as a matter of law, labour boards also have a collateral responsibility to recognize the constitutional principle that, if there is any conflict between valid federal legislation and valid provincial legislation, then the latter statute must give way. The federal statute, however, is only paramount in situations where there is a conflict between the two statutes. This leaves the Board the responsibility of determining in any given fact situation whether there is a sufficient incompatibility between the collective bargaining legislation and the anti-inflation legislation so that its primary responsibility of administering the *Labour Relations Act* must give way to its collateral responsibility of recognizing the division of powers under Canada's constitution.

23. In this case, the Memorandum of Agreement executed on September 8th does constitute a collective agreement according to our interpretation of the *Labour Relations Act*. Both parties, however, agree that they are bound by the federal *Anti-Inflation Act*. Given the opposing thrusts of the two legislative schemes, the question is what effect should be given by the Board to a collective agreement made in the shadow of the anti-inflation program.



24. An examination of this Board's recent decisions indicates that the answer to this question will depend upon the terms negotiated by the parties in their collective agreements. The first decision in this respect was *Mole Construction Company*, [1976] OLRB Rep. Aug. 391. In that case, the parties had entered into a collective agreement that made no reference to the *Anti-Inflation Act*. The compensation package in that agreement was well in excess of the anti-inflation guidelines. The union came to the Board under section 112 a of the Act in order to enforce fully the monetary package set out in the collective agreement. In these circumstances, the Board held that there was a collective agreement in force, and that the employer had breached that agreement by holding back a certain percentage of the wage increase pending approval by the *Anti-Inflation Board*. The Board, however, recognizing the possibility of a conflict with the anti-inflation program, made no order for the enforcement of the collective agreement, but left it to the parties to work out their own remedy, suggesting any amount in excess of the guidelines might be set aside until a final determination had been made under the *Anti-Inflation Act*. This approach, although eliminating any immediate incompatibility between the collective bargaining statute and the *Anti-Inflation Act*, required the Board to adjust its own procedures so as to take into account the anti-inflation legislation.

25. A second case involving an agreement made in the shadow of the *Anti-Inflation Act* was *Silverwood Dairies*, Board File No. 1518-76-R. In that case, the parties executed a memorandum of settlement that provided for a wage settlement in excess of the A.I.B. wage guidelines. The memorandum of settlement provided that the settlement was subject to A.I.B. approval and that, in the event of a roll-back, the parties would agree to re-negotiate the method of implementing the roll-back. The Board, having regard to extrinsic evidence, held that the express reference to the settlement being subject to A.I.B. approval, created a situation where the agreement only becomes a collective agreement upon the occurrence of the stipulated condition precedent of Anti-Inflation Board approval. This is a case where it was the parties, rather than the Board, that adjusted as a result of the presence of the anti-inflation legislation. The result, as the Board pointed out in that case, was "less than optimal from a labour relations standpoint".

26. A third case, *Croven Limited*, Board File No. 1983-76-U, involved a memorandum of agreement that was made without any reference to the effect of an Anti-Inflation Board roll-back. A roll-back did in fact occur, and the question was whether the union's threat of strike action was unlawful. The Board held that the effect of the roll-back was to "undermine the very basis on which the parties had entered into their agreement". As a result, what had been a collective agreement was rendered null and void by the intervention of the Anti-Inflation Board, the underpinning of that agreement having disappeared. From a labour relations perspective, then, it could not be said that the collective agreement survived the roll-back. The Board, however, made it clear that, even though the parties would be required to re-negotiate, this result was not incompatible with the thrust of the anti-inflation legislation, since both parties must re-negotiate in the light of the specific ruling of the Anti-Inflation Board.

27. The facts of this case differ from those found in any of the cases described above. Here, the parties have made an unconditional agreement as contrasted with the agreement made in *Silverwood Dairies*, and have put their minds to the possibility of a roll-back. Contemplating this eventuality, they have expressly provided a procedure for resolving any differences that arise relating to the implementation of the roll-back. Unlike the situation

in *Mole Construction Company and Croven Ltd.* where the collective agreement was silent as to the eventuality of a roll-back, these parties have agreed in their earlier negotiations that their collective agreement can be amended by the unilateral act of one of the parties. The consensual aspect of their earlier agreement, therefore, did not disappear upon the intervention of the Anti-Inflation Board. The collective agreement by its terms survived the roll-back, creating a bar to the resort to economic sanctions by either party.

28. The Board therefore declares that the respondents are engaged in an illegal strike under the *Labour Relations Act*. The Board directs that the respondents, United Steelworkers of America, Local 5788, and the respondents listed on Schedule "A" cease and desist from engaging in any unlawful strike or doing any act which they know or ought to know as a probable and reasonable consequence of such acts would result in an unlawful strike by the employees of Ferranti-Packard Limited at Dieppe Road, St. Catharines, Ontario.

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**1518-76-R** Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant), v. Silverwood Dairies, Division of Silverwood Industries Limited, (Respondent), v. Office & Professional Employees International Union, Local 473, (Intervener).

**Certification – Collective Agreement – Timeliness – Effect of collective agreement being contingent on A.I.B. approval on determination of open period – Whether certification application timely.**

**BEFORE:** M.G. Picher, Vice-Chairman, and Board Members O. Hodges and F.W. Murray.

**APPEARANCES:** Douglas J. Wray, Frank Buck and Carolyn Jubenville for the applicant; J. A. Houston and G.E. Robertson for the respondent; J. Sack for the intervener.

**DECISION OF THE BOARD:** March 11, 1977

1. This is an application for certification.
2. The intervener, the incumbent union whose bargaining rights the applicant seeks to displace, raised a preliminary objection to the timeliness of the application. It submits that the hearing of this application must be adjourned pending the outcome of an appeal presently before the Administrator under the Anti-Inflation Act. The facts in this case give rise to a somewhat novel issue.
3. Four years ago the intervener was certified as exclusive bargaining agent of the office and clerical employees of the respondent at London. (Board File No. 3699-73-R, August 17, 1973.) The respondent employer and intervener union executed a collective agreement on August 20, 1974, which agreement terminated December 31, 1975. Negotiations to



renew that agreement were lengthy, and in May of 1976 the parties entered conciliation pursuant to section 15 of The Labour Relations Act with the appointment of a Conciliation Officer by the Minister of Labour.

4. On June 1, 1976 the respondent and intervener executed a memorandum of settlement. It provided that the term of their new collective agreement should be from January 1, 1976 to December 31, 1976 and it provided a wage settlement in excess of the AIB wage guidelines then in effect. The last two terms of the memorandum are as follows:

- This settlement is subject to AIB approval and the employer agrees to recommend the settlement to the AIB
- If any part of this agreement is rolled back by the AIB the parties agree to re-negotiate the method of implementing the roll-back.

5. In view of the settlement reached the Minister obviously did not issue a report recommending that a Board of Conciliation should or should not be appointed. Rather, by a letter dated June 14, 1976 the Minister merely advised the parties, in the normal course pursuant to sub-section 3 of section 17 of The Labour Relations Act, that the Conciliation Officer had reported that the differences between the parties concerning the terms of a collective agreement had been settled.

6. On June 21, 1976 the respondent filed a return with the Anti-Inflation Board for approval of the terms of compensation agreed upon between the parties. On October 28, 1976 the Anti-Inflation Board ruled that the compensation package agreed to, which reflected an increase of approximately 12.5%, must be rolled back to 8%. On December 3, 1976, the intervener union instituted a reference of the ruling of the Anti-Inflation Board to the Administrator. That review is now pending.

7. The specific issue raised in this application is the effect of the last two terms of the memorandum of settlement, reproduced above, and in a more general way, the ability of parties engaged in collective bargaining to make contractual provision for the protection of their rights in the event of a rollback by the Anti-Inflation Board and the consequences of such provisions on the operation of The Labour Relations Act.

8. Counsel for the intervener submits that the terms of the memorandum of settlement provide that there shall be no collective agreement between the parties until the operation of a condition precedent, namely AIB approval. He says that the intent of the document is not to provide for a collective agreement that begins to operate when the document is executed and which ceases to operate in whole or in part if at some later date its compensation terms are not approved by the AIB. In other words, it is, in the view of the intervener, an agreement subject to a condition precedent, and not an agreement defeasible on the operation of a condition subsequent. Likewise, he argues that the memorandum is not to be viewed as a contract that is effective and may be subsequently frustrated by the occurrence of events out of the control of the parties or voided for illegality since by its very terms it does not exist unless and until it receives lawful approval.

9. If the interpretation suggested by the intervener is accepted the result is that there is not yet a new collective agreement for 1976 in effect between the parties to the memoran-



dum of settlement. Sections 5(4) and 53(2) of The Labour Relations Act provided that an application for certification may be made during an open period which includes the last two months of the collective agreement and lasts until a Conciliation Officer is appointed by the Minister if the appointment occurs after the two month period is over. The instant application was filed on November 29, 1976. The issue then raised is whether the applicant may apply for certification, as it seeks to do, during the last two months of 1976, that is the "would be" statutory open period under the "would be" collective agreement for 1976. The words "would be" are used advisedly because, according to the intervener, by agreement of the parties the existence of the agreement, and therefore of the open period, depends on the ultimate ruling to be made on the Anti-Inflation Board return. If there is an approval of the settlement there is an agreement and there is therefore an open period and this application is timely. If there is no approval there is no agreement and there is no open period that may as yet be determined so that this application may be untimely. We must, says the intervener, await a future determination of the Anti-Inflation Board to know whether a two month period now behind us, during which this application was made, was an open period. If the terms of settlement are approved the application is timely.

10. According to counsel for the intervener, if the Anti-Inflation Board rollback is sustained by the Administrator, this application is untimely since the parties to the settlement would, pursuant to The Labour Relations Act, have been in conciliation in respect of the renewal of the 1975 agreement at the time the application was made. No application for certification could be made until the expiry of one year after the appointment of the Conciliation Officer at the latest.

11. Not surprisingly the applicant resists the preliminary motion. Counsel for the applicant submits that the references to the Anti-Inflation Board in the memorandum of settlement are no more than a statement of the law of the land. In his view the memorandum is a collective agreement that is subject, as are all collective agreements in these times, to alteration of its compensation package by the operation of the Anti-Inflation Act. He says that the effect of the last two paragraphs of the memorandum is simply to provide negotiation as a means to determine the distribution of compensation in the event of a rollback, rather than leave that to be unilaterally imposed by the employer.

12. Counsel for the applicant argues that for this Board to give effect to the intervener's position would be to undermine the certainty of the open period, stressing the fundamental importance of the open period to the scheme of the Act. He argues, correctly, that The Labour Relations Act has been framed in such a way as to ensure that each and every collective agreement shall have attached to it a period of time when the employees may freely choose to be represented by another union and when another union may lawfully seek to become their exclusive bargaining agent by displacing the incumbent union that has fallen into disfavour.

13. Before addressing ourselves to the consequence of the intervener's argument, we must address ourselves to its merits. What is the meaning and intent of the last two clauses of the memorandum of settlement? When a contract is ambiguous on its face, it is a well settled rule that extrinsic evidence is admissible to prove its intended meaning. Moreover, by section 92(2)(c) of the Act this Board is empowered, "to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not". The two final clauses in the memorandum of settlement would, on their face, in our view

lend themselves both to the interpretation of the applicant and of the intervener. Given the ambiguity of the words in question we are satisfied that it is appropriate to have recourse to extrinsic evidence, notably the conduct of the parties to the agreement, in order to construe its meaning.

14. The material before the Board establishes that on July 2, 1976, the respondent forwarded to the intervener a copy of the collective agreement from which Schedule D, the wage rate provision, was omitted pending the decision of the Anti-Inflation Board. The accompanying letter from the employer indicates that the agreement would be completed and signed after the ruling of the Anti-Inflation Board, and not before. Mr. Edward Clancy, who is the President of the intervener and was present at all negotiations that led up to the execution of the memorandum of settlement, testified on the intervening union's behalf. He stated that the parties intended to conclude their agreement only once the Anti-Inflation Board ruling was handed down and that the parties did not intend to have any new agreement made effective prior to that time. His uncontradicted evidence is that in the interim management has unilaterally paid the employees an 8% wage increase, the maximum allowable under the Anti-Inflation Board guidelines until approval of a higher increase is given. He testified further that the 1976 agreement has introduced a change in the classification system whereby the employees are placed in 3 classifications as opposed to the 5 classifications that existed in the old agreement. Since the signing of the memorandum of settlement a number of grievances have been filed and have been or are being dealt with within the framework of the 5 classifications in effect under the old agreement. The evidence is that the parties to the memorandum of settlement are acting in a manner consistent with the view that the 1976 contract is not yet in effect and that their relationship is governed by a mutual but qualified adherence to the terms of the preceding collective agreement.

15. Parties to collective bargaining in these days are obviously conscious of the Anti-Inflation Act and its bearing on the outcome of their negotiations. Not surprisingly, collective agreements are beginning to reflect that awareness and to provide for what will happen in the event of a rollback, (see e.g. *Transport Labour Relations*, a decision of the Labour Relations Board of British Columbia, [1976] 2 Canadian L.R.B.R. 374 at 376). In the normal course of things it is fair to infer that parties that advert expressly to the Anti-Inflation Act in their agreements, do so out of a desire to do something more than merely embellish their contract with a restatement of the law of Canada. This must be especially so where they expressly provide a means to remake all or part of their agreement in the event of a rollback. In the instant case the parties have provided "re-negotiation" as a means to implement a compensation package within a rollback. That is something that is neither given nor taken away by the Anti-Inflation Act. That statute is silent on what course is open to the parties to a settlement in such an event. The reference to Anti-Inflation Board approval in the memorandum of settlement must, therefore, be seen as more than a statement of the law.

16. The final clause of the memorandum under consideration provides:

If any part of this agreement is rolled back by the Anti-Inflation Board, the parties agree to re-negotiate the method of implementing the rollback.

Several interpretations are possible. One is that the parties have agreed to talk and to work out together the distribution of a rolled back compensation package with no provision for



what will happen if some ultimate disagreement is reached. Another is that, in the event of disagreement, there would be some unarticulated residual right in the employer to unilaterally impose the implementation of the rollback as it sees fit. Counsel for the intervener submits that the meaning of the word "negotiation" in the labour relations context must imply that the parties will be returned to the "no contract" position where they have recourse to their ultimate bargaining devices, the strike and lock out. Counsel for the applicant has urged upon the Board a fourth interpretation, suggesting that the resolution of an impasse as to implementation of the rollback would be a matter to be submitted to arbitration by way of a policy grievance. He argues that the memorandum is a collective agreement and must be deemed to contain the provision for arbitration to resolve differences of interpretation that is imposed by section 37(2) of The Labour Relations Act. He submits, therefore, that any disagreement respecting implementation of the rollback is a matter of interpretation which must be submitted to arbitration.

17. With that view we cannot agree. Section 37(2) provides a mechanism to resolve a dispute between the parties relating to the "interpretation, application or administration" of a collective agreement. That is predicated on the existence of a document that sufficiently defines the private law of the parties. It is one thing to interpret or apply that law and quite another to make it. The grievance arbitrator would in effect be an interest arbitrator who would draw the collective agreement for the parties, not by a process of interpretation, application or administration, but by a process of interest adjudication. Parties to collective bargaining have it open to them to expressly provide for interest arbitration as a means of dispute settlement in the event of impasse over the implementation of an Anti-Inflation Board rollback. The parties here have not availed themselves of that option. We do not see how the express provision for re-negotiation can be tortured into the conclusion that the parties have agreed or should be deemed to have agreed to resolve their potential differences by arbitration. Counsel asserts the existence of a collective agreement, the very question before the Board, to establish that a collective agreement exists between the parties. We cannot accept that reasoning nor the interpretation attached to it.

18. The issue before the Board is, more narrowly, the effect of the first of the two paragraphs of the memorandum of settlement reproduced in paragraph 4, *supra*. The negotiation process described in the second paragraph could occur as easily in the event of the striking down in whole or in part of the agreement on the occurrence of a condition subsequent as upon the non occurrence of an event that was set up as a condition precedent to its existence. In other words, it sheds no light on whether the 1976 agreement was held in abeyance until AIB approval or was operative until a rollback was imposed. In either re-negotiation could occur. We do not, therefore, need to concern ourselves with the precise meaning of that paragraph save to say that we reject the interpretation of it put forward by counsel for the applicant and discussed above.

19. The only material that the Board has before it that can assist in the interpretation of the words "subject to AIB approval" is the extrinsic evidence as to the conduct of the parties. While the wording of that clause may be ambiguous the extrinsic evidence is not. The uncontradicted weight of that evidence is that the parties are awaiting a final Anti-Inflation Board determination prior to the execution and implementation of the formal collective agreement. They are living under the terms of the old agreement subject to the unilateral increase of wages to the Anti-Inflation Board guideline level of 8% by the employer without objection from the union. The conduct of the parties demonstrates an intention



consistent with the interpretation of the memorandum of settlement submitted by the intervener. We find, having regard to extrinsic evidence adduced, that the memorandum of settlement provides for a collective agreement to become effective only upon the approval of the Anti-Inflation Board. No argument was made that "Anti-Inflation Board approval" should be distinguished from approval of the Administrator upon review of an Anti-Inflation Board ruling or from a final appeal to the Anti-Inflation Tribunal. We are satisfied that the memorandum must reasonably be taken to imply the exhaustion of the full panoply of proceedings provided under the Anti-Inflation Act. In this regard we note that neither party has sought to re-negotiate the method of implementing the rollback during the reference to the Administrator.

20. We therefore find that it is impossible to determine as yet whether or not the memorandum of settlement stands for a collective agreement between the parties for the year 1976. It is therefore impossible to determine at this time whether the instant application is timely. To borrow an unfortunate but appropriate word coined by the dissenting Board Member in *Pacific Press, infra*, the timeliness of this application is, at the present time, "an unknowable".

21. That finding does not however, undermine the concept of the open period provided in the Act and specifically protected by section 44. The consistent view of this Board has been that The Labour Relations Act provides that an open period during which an application for certification or termination may be made must attach to every collective agreement. (*Norfolk Knitters Limited* [1973] OLRB Rep. Apr. 202; *Canadian Phoenix Steel Products Ltd.* [1974] OLRB Rep. Mar. 144). If the result in this case produces some uncertainty, this is unavoidable given the existence of the Anti-Inflation Board. We would stress, however, that in this case the existence of an open period is in all circumstances preserved. That is to say:

- a) If the 1976 agreement is approved, this application is timely.
- b) If the 1976 agreement is not approved an application in May of 1977 (being more than one year after the appointment of the Conciliation Officer) will be timely if no other agreement is then in operation.
- c) If the 1976 agreement is not approved by May of 1977 and a further collective agreement is in operation an application will be timely in the last 2 months of that agreement, unless it is of more than 3 years in duration, in which case an application will be timely after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month, and during the two-month period immediately preceding the end of each year thereafter, as well as after the commencement of its last two months of operation.

22. While our interpretation of the memorandum of settlement necessarily leads us to sustain the intervener's objection we would add that the arrangement that the intervener and respondent have in this case fashioned for themselves, albeit permissible, may be less than optimal from a labour relations standpoint. The lengthy deferment of contractual and statutory rights may well foster frustration bred of uncertainty and pose a threat to labour relations stability in a given work setting. Here, there is uncertainty for the worker who does

not yet know what his contract wage was for his work of last year and this year and who will not know for some time which union will represent him. There is uncertainty for the respondent employer whose financial planning from January 1, 1976 forward must proceed for the time being without sure knowledge of its ultimate wage liability. And there is uncertainty for the intervener union which, according to Mr. Clancy, has already begun negotiating a 1977 agreement with the employer. It cannot know whether its notice to bargain to renew the "would be" 1976 agreement is effective until that agreement is approved into existence by the AIB. How too can it know whether the Minister would have the jurisdiction to appoint a Conciliation Officer for the 1977 contract negotiations, a precondition to the intervener's right to strike? The existence of a prior agreement and proper notice to bargain, conditions on which the appointment of the Conciliation Officer would depend, are not yet determined. Moreover, how can the parties realistically bargain for a 1977 contract respecting wages when they do not yet know the 1976 base wage that would be their normal starting point? It would appear that they must either negotiate contingencies upon contingencies or await the fate of their 1976 settlement. The stacking of settlements in indefinite holding patterns like so many circling airplanes has, from the standpoint of labour relations, little to commend it. It must also be appreciated, however, that in normal circumstances conditional settlements will be rare because delay and uncertainty usually profit neither party to a collective agreement. Moreover, the circumstances that gave rise to the uncertainty in this case appear to be temporary. It may reasonably be expected that the unusual problem encountered in this case is not likely to occur after the passing of the Anti-Inflation Board.

23. Lastly, the Board wishes to emphasize that its decision in the instant case rests not on an interpretation of the effect of the Anti-Inflation Act on an existing collective agreement, as did the decision of this Board in *Mole Construction Co.* [1976] OLRB Rep. Aug. 391 and the decision of the Labour Relations Board of British Columbia in *Pacific Press Limited*. [1976] 2 Canadian L.R.B.R. 342. Nor does it concern the effect of an Anti-Inflation Board rollback on an existing collective agreement, that does or does not contain an Anti-Inflation Board rollback contingency clause, which issue arose in relation to the two collective agreements respectively, considered by the Canada Labour Relations Board in the *Cyprus Anvil* case, [1976] 2 Canadian L.R.B.R. 360. In the instant case, the Board is concerned solely with the effect of a settlement that defers either the existence or the operation of a collective agreement to the occurrence of an uncertain future event that is outside of the control of the parties. *Turney and Turney v. Zhilka* [1959] 19 D.L.R. 2d 447 at 450 (S.C.C.).

24. The Board therefore orders that the hearing of the instant application be adjourned until the final disposition of the reference presently pending before the Administrator under the Anti-Inflation Act. The intervener shall notify the Registrar of the decision of the Administrator upon receipt, oral or written, of that decision, whereupon the Registrar shall list these proceedings for continuation on the earliest available date.

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**1743-76-R** Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC, (Applicant), v. Guelph Beef Centre Inc., (Respondent), v. Ministry of Correctional Services, (Intervener).

**Certification – Employee Bargaining Unit – Whether inmates employed in private firm located on prison premises are employees – Whether bargaining unit should include both inmate and non-inmate employees.**

**BEFORE:** A.L. Haladner, Vice-Chairman, and Board Members J.D. Bell and M.J. Fenwick.

**APPEARANCES:** *Vincent Gentile and Julius Hoebink for the applicant; E.L. Stringer and L. Goldstein for the respondent; Bruce Hawkins for the intervener.*

**DECISION OF A.L. HALADNER, VICE-CHAIRMAN, AND BOARD MEMBER M.J. FENWICK:** March 29, 1977

1. In this case, the Board was concerned with an application for certification for the employees of the respondent in a unit described as:

“All persons attached to the production at Guelph Beef Centre Inc., 785 York Road, Guelph, Ontario, excluding foremen and all those above the rank of foreman office staff and sales staff.”

The application is a novel one in that over half the employees in the unit applied for are inmates of a provincial correctional institution.

2. The respondent operates a slaughter-house or abattoir on the premises of the Guelph Correctional Centre Services. Under that agreement, the Ministry (the “licensor”) is required, among other things:

To interview inmates of the Guelph Correctional Centre ... and to recommend to the Licensee based upon the results of such interviews, and to the best of the Licensor’s ability, Inmates thought by it to be suitable candidates for employment in the operation of the Abattoir in accordance with Licensee’s requirements in that regard from time to time”.

and

“To provide the necessary security system and personnel having regard to the location of the Abattoir and the employment of the inmates therein PROVIDED, however, that such security system and personnel engaged in connection therewith shall not unnecessarily interfere [sic] with the operation of the Abattoir as a normal commercial enterprise and shall not unnecessarily hinder free access to the Abattoir by the Licensee’s directors, officers, employees, servants, agents, contractors, customers and/or other invitees. The Licensor shall provide such custodial services for Inmates employed by the Licensee as shall be thought necessary by the Licensor”.

For its part, the respondent (the “licensee”) is required, among other things:



“To provide employment to as many Inmates as practicable having regard to the efficient operation of the Abattoir. The Licensee shall faithfully train and instruct all Inmates it employs and shall use its best efforts to train each Inmate in as many aspects of the Abattoir as is practical having regard to the length of time available to train such Inmate and the efficient operation of the Abattoir. The Licensee shall consult with the Licensor from time to time as to its proposed Inmate employment and training programme but shall be the final arbiter concerning the selection, employment, dismissal, training and work methods of all employees including Inmates”.

and

“To pay Inmates employed in the operation of the Abattoir wages equivalent to the average rate of pay for the various classifications of meat packing house employees in the Guelph area, on a productivity or piece work basis, said average rate of pay to be determined by an independent firm of consultants to be selected by the parties hereto and to also provide such Inmates with such other benefits as may be required by statute. All wages earned by Inmates, less all required deductions, shall be paid to the Licensor for distribution of credit to the Inmates who have earned same and the Licensor shall provide the Licensee with a receipt for the same for and on behalf of the Inmates whose work shall have earned the same to the intent that the Licensee shall have evidence that it has fulfilled its obligations to pay the wages owed by it to such Inmates”.

3. The Agreement also states that:

“The parties hereto recognize that the operation of the Abattoir forms an essential part of the Licensor’s Inmate rehabilitation programme and is considered by the Licensor to be a directly related operation of the Guelph Correctional Centre and that one of the most important purposes thereof is to place Inmates in an industrial environment insofar as is reasonably possible. Prior to the Commencement Date, the Licensor and Licensee shall settle the general guidelines governing the operation of the Abattoir and shall thereafter continue to consult each other as to all matters affecting Inmates. The Licensor shall have the right to appoint a liaison officer to consult with management of the Licensee as to all matters affecting Inmates, it being understood, however, that the Licensor shall not interfere [sic] with the operations of the Abattoir and that the Licensee shall at all times be the final arbiter as to matters involving the selection, employment, dismissal, training and work methods of all employees, including Inmates, employed in the operations of the Abattoir and as to all matters in connection with the day to day operations of the Abattoir”.

and that

“In co-operation with the Licensor’s rehabilitation programme, the Licensee agrees to use its best efforts to find suitable employment with its organization for former Inmates who have been employed by the Licensee in the op-

eration of the Abattoir and who meet Licensor's normal employee qualifications".

4. It was agreed that the purpose of this latter provision was not to grant former inmates a preference in hiring in respect of the operation of the "Abattoir", which would have the effect of frustrating the continued operation of the Ministry's rehabilitation programme at the Guelph Reformatory. Rather, it was intended to give inmates priority in the respondent's other meat-packing operations, all of which are located outside the prison. The Board was informed that the Ministry and the respondent have a working understanding that no ex-inmates will remain in the Abattoir unless a vacancy exists.
5. Apart from its relationship to the Guelph Correctional Centre, there is little to distinguish the operation of the Abattoir, as a private commercial enterprise, from that of any other slaughter-house. The respondent has the capacity to slaughter and process 2,000 head of cattle per week and is a major supplier of boxed and carcassed beef in the Guelph regional market. Its products are sold competitively to the regular distributors, brokers and retailers in competition with all other firms in the industry.
6. As of the date of the union's application for certification, there were (exclusive of managerial and confidential personnel) 78 persons attached to the respondent's production facility, of which 43 were inmates of the Guelph Correctional Centre. The inmates work as trainees and are paid \$3.50 to \$4.05 an hour for a 40-hour week. They are permitted to work overtime. The Ministry deducts \$35.00 a week for room and board from the wages of each inmate. The remainder is held in trust and distributed to the inmates upon their release from prison. The inmates work side by side with the non-inmate employees of the respondent, often on the same jobs, and using the same skills. During their time at work, the inmates are under the direction and supervision of the management of the respondent, as are all of the respondent's other production workers.
7. This application poses two questions for the Board: does The Labour Relations Act apply to the inmates who are engaged in the work of the respondent? If so, should the inmates be included in the unit for which the certification application was made. The issue as to the applicability of the Act, in turn, has two distinct branches: are the inmates excluded from coverage under the Act by reason solely of their prisoner status? If not, can they be considered employees of the respondent and thus within the purview of the statute.
8. The Labour Relations Act does not define the categories of persons to whom it applies. Instead, it enumerates certain classes of persons to whom it does not apply. Classes of persons who do not fall within the enumerated exclusions are not covered where other legislation, either expressly or by necessary implication, excludes them. (See, for example, *Industrial Training Branch of the Department of Labour*, [1965] OLRB Rep. Dec. 655, the case of Crown employees.) However, the Board does not, in the absence of clear outside statutory authority, take it upon itself to exclude additional categories of persons in view of the specificity of the exclusions found in The Labour Relations Act and in light of the general policy of that Act, which is to promote collective bargaining.
9. Prisoners, as such, do not constitute a category of persons specifically excluded from The Labour Relations Act, and the Board is not aware of any external legislation which could be said to exclude them. Accordingly, it must be presumed that the legislature



intended to permit this group of people to come under the provisions of the Act, provided that they can qualify as employees. It should be emphasized that the Board is not, in this case, dealing with a situation where a union has attempted to organize a unit of prison inmates qua inmates to bargain with the prison authorities or the government. The union here has organized the entire production work force of a private meat-packing firm without regard to the status of the individual workers while outside the plant. It is true that a majority of the persons in the unit applied for are inmates of the Guelph Correctional Centre, but the applicant is seeking *only* to represent these people in their relationship with the respondent.

10. Because the right to engage in collective bargaining under The Labour Relations Act depends on the existence of employee status (the Board's mandate under section 6 of the Act is to determine the unit of employees that is appropriate for collective bargaining), persons who do not have that status are excluded from the ambit of the statute. In determining whether a group of individuals are employees of a particular employer, the Board has regard both to the traditional common law indicia of an employer-employee relationship and to the purposes of the statute under which that legal determination must be made. (See, for example, *Loblaw Groceries Co. Ltd.*, 66 CLLC ¶16,078.) A fundamental premise of The Labour Relations Act is that the bargaining power of individual employees must be combined so as to provide a sufficient countervailing force to the economic power of the employer. Accordingly, it is appropriate, in deciding the question of employee status, that we consider not only the position of the individuals whose collective bargaining is at issue, (i.e. whether collective bargaining is a necessary and/or suitable vehicle for the settlement of terms and conditions under which they work), but also the collective bargaining concerns of the union which seeks to represent them. As the British Columbia Labour Relations Board pointed out in *Cranbrook District Hospital*, [1975] 1 Canadian LRBR 42, a case which dealt with the employment status of student practical nurses, a union has a legitimate interest in ensuring that its bargaining strength is not diluted by the exclusion of persons from the bargaining unit who are performing the same work as the bargaining unit employees. (See in this connection also the decisions of the British Columbia Labour Relations Board in *St. Paul's Hospital*, [1976] 2 Canadian LRBR 161 and *Pacific North Coast Native Cooperative*, [1976] 2 Canadian LRBR 433.)

11. We do not intend in this decision to embark upon a review of the criteria formulated by the Courts to determine the existence of an employer-employee relationship. As a number of judges and commentators have pointed out, these criteria do not admit of precise formulation, and do not all carry the same weight in individual cases. Our intention is to summarize those features of the relationship between the inmates and the respondent which we believe are relevant to the question whether the former can be considered employees of the latter from the viewpoint of the common law. We then propose to highlight those features of the relationship which are especially pertinent to the issue of employment status from the perspective of The Labour Relations Act.

12. What are the relevant, factual features of the inmates' relationship to the respondent?

- (1) Although the Ministry does interview and receive from the respondent inmates thought by it to be suitable candidates for employment, it is the respondent which has the final say in the decision as to which inmates will be hired.



- (2) Once selected for employment, the inmates are under the direction and supervision of the respondent during their time at work, which may include overtime. The Ministry does provide security and custodial services, but those services are not intended to interfere with the respondent's control over the inmates in their capacity as workers.
- (3) The Ministry deducts from the wages of the inmates a standard amount per week for room and board and holds the remainder of the inmates' wages in trust pending their release from prison. But the inmates are all paid by the respondent, not the Ministry.
- (4) While the expectation of everyone concerned is that the inmates will sever their relationship with the respondent upon their release, the inmates' work is evaluated by the respondent, and they are eligible for promotion. As well, they are granted a preference in hiring in respect of the respondent's operations outside the prison grounds.
- (5) An inmate who misbehaves on the job is subject to prison discipline and, ultimately, to removal from the respondent's work force. However, the discipline of the inmates, up to and including discharge, is at the sole behest of the respondent insofar as their work performance is concerned.

13. In sum, most of the normal indicia of an employment relationship; hiring, control and direction of the work force, payment of wages, promotion and discipline are present in the relationship between the inmates and the respondent although perhaps, to a somewhat lesser degree than is normally the case in the industrial setting. It is also, we think, of some moment that the license agreement between the Ministry and the respondent refers to the inmates as "employees".

14. At the hearing, much was made of the fact that the respondent's operation is an essential part of the inmate rehabilitation programme at the Guelph Correctional Centre and that it is located on the prison grounds. There can be no doubt that the rehabilitative aspect of the work, which the inmates perform while under the control and direction of the respondent, is the primary value of the license agreement from the Ministry's point of view. But from the point of view of the respondent, which is the alleged employer, the services provided by the inmates are an integral and significant part of its meat-packing operation. The Abattoir, as it currently operates, is not in any way, shape or form a sheltered workshop or protected work environment. It is a modern, efficient, well-equipped slaughter-house where each employee is expected to do a full day's work under normal production standards. The services which the inmates provide are not only of substantial benefit to the respondent, they are services which would otherwise have to be obtained from another source. This business reality is reflected in the inmates' rate of pay, which is required by the terms of the License to be equivalent to the average rate of pay for various classifications of meat packers in the Guelph area.

15. In our view, the work which the inmates do for the respondent is somewhat analogous to the work done by the residents and interns for the hospital in *St. Paul's Hospital* (supra). In that case, the British Columbia Labour Relations Board concluded that the resi-

dents and interns were employees of the hospital, notwithstanding the fact that the medical care which they provided was done in a manner and within a format which provided a sustained clinical education in medicine.

16. The employment situation in this case, moreover, should be contrasted with that which obtained in *Cranbrook District Hospital* (supra) and *York University*, [1975] OLRB Rep. September, 683, where the British Columbia and Ontario Boards, respectively, concluded that the limited benefit accruing to the hospital (university) from the alleged employees was "an incidental by-product of a programme designed and administered with quite a different objective". To put the comparison in the negative, the work performed by the inmates for the respondent, in contrast to the work performed by the student practical nurses at Cranbrook District Hospital and the work performed by the graduate assistants at York University, is not of a "supernumerary and non-essential nature".

17. As far as the location of the Abattoir on the grounds of the Guelph Correctional Centre is concerned, this merely reflects the stage of rehabilitation of the inmates who are engaged in the respondent's operation. Unlike inmates on temporary leave permits, the inmate employees of the respondent are not permitted to work outside the prison grounds. In this connection, it should be noted that, although the Guelph Reformatory inmates are all required to work, participation in the rehabilitation programme is voluntary and available only to those who are judge by the Ministry "to be suitable candidates for employment in the operation of the Abattoir in accordance with the (respondent's) requirements in that regard from time to time".

18. We therefore find that, as a matter of common law, the inmates in the unit applied for are employees of the respondent.

19. Turning now to the features of the relationship between the respondent and the inmates which have implications peculiar to collective bargaining, an important consideration here is the degree to which the exclusion of the inmates from the provisions of The Labour Relations Act would dilute the bargaining strength of the applicant, which would then represent only the non-inmate employees of the respondent. As the applicant pointed out, if the inmates were excluded from the scope of its certification(s), that would leave the respondent free to draw on a virtually captive labour market in the event that negotiations for a collective agreement reached an impasse and a strike was called. Moreover, the knowledge that this might occur would undoubtedly become part of the calculus of the parties from the outset, with the result that the balance of economic power would be tipped in favour of the employer. Thus we have, in practical terms, a situation where a decision to deny a particular group of workers access to the collective bargaining process would have the effect of impairing the ability of a union to negotiate effectively on behalf of a group of employees whose right to collective representation is not in dispute. In our view, this is an additional reason for finding that the inmates are employees of the respondent, and thus entitled to participate in the system of collective bargaining provided for in The Labour Relations Act.

20. There are two other features of the inmates' employment situation to which we should briefly advert. Counsel for both the respondent and the Ministry placed stress on the fact that the inmates' term of employment was necessarily of limited duration (being limited to the term of their sentences which cannot exceed two years less a day), and that their wages were tied to those of an "outside" group of workers. While the term of employment



may, in certain narrowly-defined circumstances which are not here material, be a proper ground for the exclusion of employees from a bargaining unit of other employees enjoying more permanent employment status, the Board has long taken the position that it is not a relevant consideration in determining whether an employee should be granted bargaining rights. Moreover, once it is established that a person is an employee, the questions of whether certification will, in fact, turn out to be of benefit to the employees affected or may pose practical problems for the parties concerned are not ones for consideration by the Board. (See *Sinclair Cut Stone and Construction Co. Ltd.*, 52 CLLC, ¶17,009 and *Toronto Driving Club Ltd.*, [1964] OLRB Rep. April, 33.)

21. In the instant case, however, there is no reason to suppose that the applicant cannot bargain effectively with the respondent about the inmates' terms and conditions of employment. It is true that the respondent is required by the terms of its License with the Ministry to pay its inmate employees wages equivalent to the average rates in meat-packing houses in the Guelph area. But, quite apart from the question of whether the Ministry can contract with a private employer to preclude the normal operation of the collective bargaining process under The Labour Relations Act, we do not construe the License as an impediment to the applicant's right to negotiate with the respondent over the wages of the inmates. In any event, a collective agreement is concerned with a great many matters besides wages. It may be, as counsel for the respondent suggested, that the scope of the bargaining, in respect of some of the inmates' other terms and conditions of employment, will be circumscribed in certain areas by reason of their prisoner status. But we are not persuaded, on the evidence and representations before us, that meaningful collective bargaining cannot occur.

22. That brings us to the question of the appropriateness of the bargaining unit claimed by the applicant. The issue here is whether the inmates should be included in the same bargaining unit as the other employees of the respondent (as the applicant suggests), or whether they should be segregated from those employees for collective bargaining purposes and placed in a unit of their own (as the respondent proposes).

23. Because of the fragmentation and industrial unrest which would result from another description, the Board's standard production unit is described as:

"All employees ... save and except foremen, persons above the rank of foreman, office and sales staff".

The Board has, on occasion, departed from this well-established practice, but not without good reason. In the instant application, the only ground for departure would be that the inmates do not exhibit a sufficient community of interest with the other employees of the respondent to warrant their inclusion in the same unit. The argument that inmate and the non-inmate employees of the respondent do not share a community of interest might appear at first blush to have merit. However, upon reflection, it is not persuasive. The question as to whether an employee shares a community of interest with his fellow workers so as to be included in a bargaining unit with them depends on his status while in the employment relationship and not on what ultimate authority he may be subject to at other times. Although this criterion has never been applied by the Board in the case of inmates who work within the boundaries of a prison, the point being one of first impression, the Board has not excluded inmates on temporary leaves of absences from bargaining units of the kind here applied for. They were not excluded from the certificates previously granted to the applicant at



Canada Packers Limited in Walkerton or at Swift Canadian Company Limited in Hanover. Each of these units has inmates among its members. It should be noted here as well that the National Labour Relations Board has included prisoners employed under work-release programmes in units in which they would ordinarily be placed on the ground that they shared a community of interest with their "free world" counterparts while on the job. (See *Winsett Simmonds Engineers, Inc.*, [1967] CCH NLRB ¶21,349 and *Georgia Pacific Corporation*, [1973]CCH NLRB ¶25,035.)

24. The evidence in this case reveals an almost total assimilation of the inmates with the respondent's production work force. As noted earlier, the inmates work side by side with the other employees of the respondent, often on the same jobs, employ the same skills, and are subject to the same supervision and direction. We find that while in the employment relationship, they have a substantial community of interest with the non-inmate employees. For that reason, we decline to alter our normal practice with respect to the description of the bargaining unit. Accordingly, the Board finds that

All employees of the respondent at 785 York Road, Guelph, save and except foremen, persons above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

25. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on January 20, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

26. A certificate will issue to the applicant.

#### **DECISION OF BOARD MEMBER, J.D. BELL:**

1. I agree with the majority that the inmates concerned in this application are employees of the respondent for purposes of The Labour Relations Act.

2. The inmates, because of the restrictions placed on their activities by reason of their prisoner status, should be granted a bargaining unit separate from the civilian employees. This would permit them to bargain for terms and conditions of employment suitable for their restricted work climate.

3. It would further the primary purpose of the rehabilitation programme to place them in an industrial environment insofar as it is practical, and avoid their being submerged in a civilian unit within a reformatory which will have different objectives and problems.

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**1547-76-R** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 306, (Applicant), v. Beatrice Foods (Ontario) Limited Lakeview Dairy Division, (Respondent). v. Group of Employees, (Objectors).

**Certification – Membership Evidence – Effect of membership evidence filed on behalf of applicant local not clearly referring to that local.**

**BEFORE:** Kevin M. Burkett, Vice-Chairman and Board Members D.B. Archer and J.E.C. Robinson, Q.C.

**APPEARANCES:** *John McNamee, Archie Buckworth and Jim Applegate for the applicant, R.C. Filion and C.E. Smith for the respondent, Leonard Duckworth and Len Harrod for the objectors.*

**DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER J.E.C. ROBINSON, Q.C.:** March 1, 1977.

1. This is an application for certification brought in the name of Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 306. At the initial hearing in this matter the respondent employer challenged the membership evidence on the basis that the designation of the local union (the applicant organization) was not affixed to the membership cards until after they had been signed. A second hearing was convened for the purpose of hearing evidence in respect of the alleged defect in the membership evidence.
2. Mr. A.W. Duckworth, the secretary/treasurer of Local 306 and the person who witnessed all of the cards in the instant application appeared before the Board to give evidence in respect of the membership evidence. It was his evidence that 22 of the 25 membership cards which were filed in support of the application were signed at a general meeting of employees held at the army-navy club in Barrie on November 23, 1976. Mr. Duckworth testified that blank cards, absent the local designation, were passed out for signature. It was his evidence that prior to the signing of cards the employees present at the meeting were given certain printed material and were told that they would be joining the local. The printed material comprised a copy of the officers. Mr. Duckworth testified that as the cards were brought forward he collected the dollar from each of the employees who signed a card, witnessed receipt of the dollar, filled in the local designation on the card and provided each employee with a receipt. He testified that the other three cards were signed in the days immediately following. A check of the membership cards revealed that only 15 of the cards had been dated on November 23, 1976, the remaining cards having been dated after November 23. Mr. Duckworth could offer no explanation for the discrepancy between his testimony vis-a-vis the dates and the dates appearing on the cards.
3. The Board jurisprudence with respect to membership evidence filed on behalf of a local union which does not on its face make reference to the local has been capsulized in the *Bernardin of Canada Limited* decision [1975] OLRB Rep. Oct. 737 wherein at paras. 5 and 6 the Board states:

"The Board has consistently ruled that evidence of membership in the international parent will not be used as evidence of membership in a local thereof. (See: *The Beaver Foundation Ltd.* case OLRB M.R. October [1967] 562; *McDonald's Consolidated Limited* case OLRB M.R. August [1969] 634). The Board has also stated that applicants for certification must be most circumspect in the quality of the evidence of representation filed in support of its claim for bargaining rights. (See: *The Journal Publishing Company of Ottawa, Limited* case OLRB M.R. July [1974] 499 at p. 501; *Le Droit Ltee* case OLRB M.R. December [1970] 905). As a result of the apparent carelessness of the representatives of the applicant in conducting its campaign the Board is placed in the difficult position of discerning on the face of the documentary evidence the intent of the applicant for membership in signing a membership card. We do not know whether it was the applicant Local 1590 or its parent International that was intended to be signified as his 'exclusive' bargaining agent. Therefore, as a result we are not satisfied that the applicant Local represents as 'members' employees in the appropriate bargaining unit for purposes of section 7 (1) of the Act. (See: *The J.D. Carrier Shoe Co. Ltd.* case OLRB M.R. April [1968] 54; *The Municipality of Metropolitan Toronto* case OLRB M.R. September [1967] 5737).

The Board furthermore is not prepared to permit oral evidence to be adduced in support of clarifying the intent of the applicant for membership in signing a card. We are of the opinion that it was not the intent of section 48 (2) of *The Board's Rules On Practice And Procedure* to permit oral evidence of membership with a view of perfecting inadequate evidence. If that were the case, the Board would be constantly waiving the privilege of the secrecy of membership evidence in order to permit trade unions to cure inadequate documentary evidence. (See: *The Cooper-Weeks Limited* case OLRB M.R. November [1969] 974). The requirements of the *Labour Relations Act* and the ancillary provisions of *The Board's Rules On Practice and Procedure* with respect to evidence of membership are designed to assure that appropriate measures have been taken by an applicant trade union for purposes of satisfying the Board that the documents submitted in support of an application for certification will support a finding for purposes of section 7 (1). We do not agree that an indiscriminate application of section 48 (2) of the Board's Rules for the purpose cited by the applicant will necessarily dissipate 'the cloud' on the documentary evidence or facilitate the disposition of the applicant's claim for bargaining rights. (See: *Dinty's Kentucky Fried Chicken* case OLRB M.R. July [1970] 511). The most appropriate measure for avoiding future predicaments of this nature is for the Board to encourage applicant trade unions to exercise some care in instructing their representatives of the Board's requirements with respect to submitting acceptable documentary evidence of membership."

In the *Bernardin* case the applicant union, a local of the International Brotherhood of Electrical Workers, filed membership cards which did not make reference to the local. The space reserved for insertion of a local number was left blank. Notwithstanding the fact that the receipt portion, which was stapled to the application, showed the local number and was signed by the collector, the Board found that the membership evidence did not satisfy that



the signatories thereto had expressed a desire to be "members" of the applicant and accordingly it dismissed the application. It should be noted that the Board has in similar circumstances been satisfied that the employees joined the applicant *local* on the basis of an unambiguous reference to the local on the receipt portion of the membership card. (See *Re Wallaceburg Hydro Electric System* [1975] OLRB Rep. Oct. 783).

4. The certification procedure has been designed to ensure the secrecy of the employees' selection and at the same time to minimize disruption to the employer's operation. The Board relies on the documentary evidence submitted by the trade union, and does not call before it each and every employee in the bargaining unit for purpose of receiving direct oral testimony as to their true wishes. Similarly the individual employees are not subject to cross-examination. The Board which relies on the documentary evidence must be circumspect in its acceptance of this evidence if it is to protect the integrity of the process. The documentary evidence which cannot be clarified by oral evidence (see *Bernardin* decision, *supra*) must speak for itself.

5. In the instant case the membership evidence did not make reference to the applicant local at the time the bargaining unit employees affixed their signatures and neither did the receipt portion make reference to the applicant local. At the time the membership documents were signed they made reference to the national organization and indeed the other printed material which was distributed to the employees was in respect of the national organization. Mr. Duckworth testified that the employees were told that they would be joining the local and that those who had signed cards were present when he affixed the local designation and that these persons did not object to the insertion of the local designation. Is the evidence of Mr. Duckworth sufficient to satisfy the Board that the employees expressed an intention to join the local? The Board thinks not. Without the first-hand evidence of the employees involved, which the Board would not be prepared to accept in any event, the Board cannot ascertain if all or a majority of the employees saw Mr. Duckworth amend the signed cards (notwithstanding the fact that the employees were standing close-by) and it follows that the Board cannot ascertain if all or a majority knew they were joining the local union. The Board must decide the matter on the basis of the unaltered membership documents as they were seen by the employees at the time they signified their intention to join. In the circumstances the Board is not satisfied that the membership evidence necessarily reflects the intent of the employees to join the applicant local.

6. Whereas the strict requirements of the Board in regard to membership evidence may seem unduly harsh or technical, there are sound reasons for the Board's approach. The underlying rationale has been well set out in the *Leons Furniture Limited* case [1976] OLRB Rep. Feb. 8 wherein at paragraph 5 the Board states

"These requirements of the Board are clear and well known and we are loathe to deviate from them. Despite the apparent arbitrary nature of such rules they fulfil three important functions - cautionary, evidentiary, and channelling. The *RCA Victor* case outlines the cautionary nature of the requirement and *Zehr's Markets Ltd.* is representative of the evidentiary perspective. The third function - that of telling employees and trade unions how membership in a trade union can be obtained for the purposes of the Act - is important to both the Board and the parties. Clear and unequivocal rules in this important area provide the kind of predictability and certainty that is re-

quired for organizational purposes and minimizes the amount of 'litigation' before the Board. Thus the certification process is expedited and the secrecy as to union membership provided under section 100 is accomplished. In other words, the more the Board deviates from its accepted practice the more parties will be encouraged to litigate the question of membership evidence with all the attendant costs of such disputes."

The Board's approach protects the integrity of a process which is based on documentary hearsay evidence. The result is to underscore the reality of the membership support enjoyed by the applicant trade union and thereby obviate the need for the union to establish employee support during the ensuing bargaining process.

7. The applicant argued in the alternative that if the Board were to find the membership evidence defective it should be permitted to amend its application from one made in the name of the local to one made in the name of the national union. The applicant cited the *Blue Bell Canada* case [1966] OLRB Rep. Feb. 809 in support of this request. The Board's jurisdiction to allow such an amendment is found in Section 93 of the Act:

"Where in any proceeding under this Act the Board is satisfied that a bona fide mistake has been made with the result that the proper person or trade union has not been named as a party or has been incorrectly named, the Board may order the proper person or trade union to be substituted or added as a party to the proceedings or to be correctly named upon such terms as appear to the Board to be just."

In the instant case the Board is satisfied that the persons filing the application fully intended to file it in the name of the local union, a union which the Board has found to be a trade union within the meaning of the Act. A bona fide mistake within the meaning of section 93 of the Act has not been made.

8. The Board is not satisfied that the membership evidence necessarily reflects the intent of the employees to join the applicant local. If the individual employees had initialled the cards after Mr. Duckworth had inserted the local number or otherwise signified in writing an acknowledgment of their intent to join the local the result would be different. The membership cards which have been filed in support of this application will be returned to the applicant.

9. This application is dismissed.

#### **DECISION OF BOARD MEMBER D.B. ARCHER:**

I do not disagree with the facts outlined in the majority decision. The Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers is a recognized National Union. It has Locals for administration purposes. In the instant case the Local involved is Local 306, Barrie whose main component is Molsons Brewery

The facts as outlined are that A.W. Duckworth, Secretary/Treasurer of Local 306 called a meeting in the Army and Navy and Air Force Hall in Barrie. A considerable number of the respondent's employees attended. Mr. Duckworth spoke to them and outlined

what the local was doing in the Barrie area. His testimony is that he "made it clear to them" that they were joining local 306. There is no dispute that a leaflet outlining the advantages of the National Union and the National Union's Constitution were also handed out. Mr. Duckworth's testimony was that cards bearing no union number were handed out. As they were brought up to him he filled in the payment portion, the date and the local union number. All in the presence of the applicant member. He further stated that the National Union was not involved in the organization of these employees. He stated that the local wanted to expand its membership so it could hire a business agent.

I would point out that the notices posted in the plant showed the local as the applicant. No objection was taken by any employee. In fact the employees who appeared to oppose the union admitted quite frankly that they knew they were being asked to join "the Molson Local". In other words, the evidence of these employees who oppose the union, and are therefore adverse in interest to the applicant, confirms the evidence of Mr. Duckworth. The objectors made it clear that it was "the Local" that they were opposing. One such employee signed a card and got it back on request. Since the union was only in a vote position it was not necessary to enquire into the origination or circulation of the petition. I am convinced that all employees were well aware they were joining the Molson local. The Board Notice made it extra clear. In my opinion we have no authority to dismiss an application merely because of insertions on the card after the actual signing, and where employees are aware of the insertion if we are assured there was no attempt to mislead or defraud the Board and where we are given the additional evidence of employees opposing the union that even they were aware they were joining the local. The only opposition in this case comes from the company.

Section 103 of the Act says,

"no proceedings under this Act are invalid by reason of any defect of form or any technical irregularity and no such proceeding shall be quashed or set aside if no substantial wrong or miscarriage of justice has occurred."

Coupling this declaration with the Preamble of Act I believe the purposes of the Act would be better served if a vote was taken with the name of the Local on the ballot. The vote would disclose the true wishes of the employees and would be in keeping with the basis purposes of the Act.







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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD. DURING FEBRUARY 1977

### BARGAINING AGENTS CERTIFIED FEBRUARY 1977

#### No Vote Conducted

**7003-74-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Stately Homes Ltd., (Respondent).

Unit #1: "all employees of the respondent engaged in apartment building cleaning and maintenance at 70 Mornelle court, West Hill, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (2 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent engaged in apartment building cleaning and maintenance at 80 Mornelle Court, West Hill, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (3 employees in the unit). (*Having regard to the agreement of the parties*).

**1662-75-R:** The Mount Nemo Truckers Association (Applicant) v. Nelson Crushed Stone, a division of King Paving and Materials, a division of the Flintkote Company of Canada Limited (Respondent) v. United Cement, Lime and Gyproc Workers' International Union, AFL, CIO, CLC, Local Union #494 (Intervener).

Unit: "all employees engaged as truckers working at or out of the respondent's quarry at Burlington, Ontario, save and except dispatcher, persons above the rank of dispatcher, office staff and persons represented by subsisting collective agreements." (56 employees in the unit). (*clarity note - see Report of full decision [1977] OLRB Rep. February*).

**0102-76-R:** International Molders & Allied Workers Union (Applicant) v. Union Electric Supply Co. Limited (Respondent).

Unit #1: "all office and clerical employees of the respondent at Rennie Street, Hamilton, save and except Branch Manager and Purchasing Agent and persons above this rank." (14 employees in the unit).

Unit #2: "all office and clerical employees of the respondent at Walnut Street North, Hamilton, save and except Branch Manager and persons above that rank." (3 employees in the unit).

**0117-76-R:** Association of Allied Health Professionals: Ontario (Applicant) v. The Salvation Army Grace Hospital (Respondent) v. Ontario Public Service Employees Union (Formerly the Civil Service Association: Inc.) (Intervener #1) v. Ontario Nurses' Association (Intervener #2) v. Group of Employees (Objectors).

Unit #1: "all paramedical employees of the Respondent in Ottawa, Ontario, save and except supervisors, persons above the rank of supervisor, persons covered under subsisting collective agreements between the Respondent and other trade unions, persons regularly employed during the school vacation period." (3 employees in the unit). (*Dismissed*).

Unit #2: "all paramedical employees of the Respondent at Ottawa, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor, persons covered under subsisting collective agreements between the Respondent and other trade unions and students employed during the school vacation period." (9 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* - see Report of full decision [1977] OLRB Rep. February). (*Certified*).

**0640-76-R:** Local Union 1687 International Brotherhood of Electrical Workers (Applicant) v. M.G. Burke Investments Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent engaged in construction work within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit). (*clarity note*-see Report of full decision [1977] OLRB Rep. February).

**0916-76R:** Ontario Nurses' Association (Applicant) v. Temiskaming Hospitals (Respondent) v. Group of Employees (Objectors).

Unit: " all registered and graduate nurses employed by Temiskaming Hospitals in Haileybury and New Liskeard, Ontario, save and except supervisors and head nurses, and persons above the rank of supervisor and head nurse and persons regularly employed for not more than twenty-four hours per week." (no employees in the unit).

**1050-76-R:** Canadian Union of Public Employees (Applicant) v. The Windsor Public Library Board (Respondent) v. Group of Employees (Objectors).

- and -

**0468-76R:** Canadian Union of Public Employees (Applicant) v. The Windsor Public Library Board (Respondent).

Unit: "all employees of The Windsor Public Library Board, save and except branch librarian, persons above the rank of branch librarian and main librarian, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (employees in the unit). (*clarity note* - see Report of full decision [1977] OLRB Rep. February).

**1081-76-R:** Canadian Union of Public Employees (Applicant) v. Tri-Town Nursing Home Limited (Respondent).

Unit: " all of the employees of the respondent at its Nursing Home at Haileybury, Ontario, save and except professional and medical staff, graduate nursing staff, undergraduate nurses, maintenance supervisor, kitchen supervisor, housekeeping supervisor, persons above the rank of supervisor, technical personnel and office staff." (39 employees in the unit).

**1182-76-R:** Teamsters Union Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousement & Helpers of America (Applicant) v. Niagara Employment Agency (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent working at and out of the City of St. Catharines, save and except foremen and persons above the rank of foreman, office and sales staff." (9 employees in the unit).

**1474-76-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Aldrovandi Equipment Limited carrying on business under the name Mainline Construction Equipment (Respondent) v. Employees (Objectors).



Unit: "All employees of the respondent in the County of Ontario (except the townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope) engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 Employees in the unit).

**1529-76R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Kenneth R. Green, carrying on business as Greens Ambulance (Respondent).

- and -

**1530-76-R** London and District Service Workers' Union, Local 220, S.E.I.U.A.F.L.,C.I.O.,C.L.C. (Applicant) v. Kenneth R. Green, carrying on business as Greens Ambulance (Respondent).

Unit: "All employees of Kenneth R. Green, carrying on business as Greens Ambulance in Simcoe, Ontario, save and except supervisors, persons above the rank of supervisor, office staff and dispatchers." (12 employees in the unit). ((h3)Having regard to the agreement of the parties(h1)).

**1537-76-R:** Amalgamated Clothing and Textile Workers Union Toronto Joint Board (Applicant) v. J.E. Wiegand & Company Limited (Respondent).

Unit: "all office employees of the respondent in Hamilton, Ontario save and except supervisors, those above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (2 employees in the unit).

**1634-76-R:** London and District Service Workers' Union, Local 220 (Applicant) v. Bethany Lodge (Respondent) v. Group of Employees (Objectors).

- and -

**1635-76-R:** London and District Service Workers' Union, Local 220 (Applicant) v. Bethany Lodge (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at R.R. #3, Lambeth, Ontario, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff." (59 employees in the unit). (*Having regard to the agreement of the parties*).

**1648-76-R:** Labourers International Union of North America, Local 493 (Applicant) v. Romm Construction Company Ltd. (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 2486 (Intervener) v. Employee (Objector).

Unit: "all construction labourers,carpenters and carpenters' apprentices in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the agreement of the parties*).

**1680-76-R:** Christian Labour Association of Canada (Applicant) v. J.N.C. Limited (Respondent).

Unit: "all employees of the respondent employed at its premises in Etobicoke, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (31 employees in the unit).

**1685-76-R:** Chrisian Labour Association of Canada (Applicant) v. Merry Hill Nursing Homes Ltd. (Respondent).

Unit: "all employees of the respondent in the Town of Strathroy, Ontario, save and except registered nurses, supervisors, persons above the rank of supervisor, office staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (55 employees in the unit). (*Having regard to the agreement of the parties*).

**1716-76-R:** Operative Plasterers and Cement Masons International Association of the United States and Canada Local 124, Ottawa-Hull (Applicant) v. The Miller Brothers Company (1962) Limited (Operating as Trent Valley Paperboard Mills) (Respondent) v. Canadian Paperworkers Union, Local 1489 (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent on new construction in Prince Edward County and the Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note- see Report of full decision [1977] OLRB Rep. February*).

**1725-76-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Plastic Surface Finishers Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Whitby, Ontario save and except foremen, persons above the rank of foreman, office and sales staff." (75 employees in the unit). (*Having regard to the agreement of the parties*).

**1726-76-R:** Local Union 636 International Brotherhood of Electrical Workers A.F.L., C.I.O., C.L.C. (Applicant) v. Preston Public Utilities Commission (Respondent).

Unit: "all employees of the respondent in the Town of Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (10 employees in the unit). (*Having regard to the agreement of the parties*).

**1737-76-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Timberline Wood Products (Windsor) Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its plant at 1637 Provincial Road in Windsor, save and except foremen, persons above the rank of foreman, persons who are regularly employed for not more than twenty-four hours per week and office staff." (13 employees in the unit). (*Having regard to the agreement of the parties*).

**1739-76-R:** Service Employees Union, Local 478 affiliated with Service Employees International Union, A.F. of L., C.I.O., C.L.C. (Applicant) v. VS Services Ltd. (Respondent).

Unit: "all employees of the respondent at Moose Factory Zone Hospital save and except supervisors, those above the rank of supervisor, dietitian, office staff and persons regularly employed for not more than 24 hours per week." (51 employees in the unit). (*Having regard to the agreement of the parties*).

**1753-76-R:** Association of Allied Health Professionals: Ontario (Applicant) v. Humber Memorial Hospital Association (Respondent) v. Ontario Public Service Employees Union (Intervener).

Unit: "all paramedical employees engaged by the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and persons covered by subsisting collective agreements." (24 employees in the unit) (*Clarity note - see Report of full decision [1977] OLRB Rep. February*).

**1754-76-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 306 (Applicant) v. Northern Feeds Limited (Respondent).

Unit #1: "all employees of the respondent at Barrie, Ontario, save and except office and sales staff, supervisors and persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during a school vacation period." (4 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Barrie, Ontario who are regularly employed for not more than 24 hours per week, save and except office and sales staff, supervisors and persons above the rank of supervisor." (2 employees in the unit). (*Having regard to the agreement of the parties*).

**1763-76-R:** United Steelworkers of America (Applicant) v. Rheem Canada Limited (Container Division) (Respondent).

Unit: "all employees of the respondent company in Oakville, save and except foremen, persons above the rank of foreman, office and sales staff." (37 employees in the unit).

**1764-76-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Creators Canada Division of American Biltrite (Canada) Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman and office and sales staff." (162 employees in the unit). (*Having regard to the representations of the parties*).

**1765-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Taro Properties Incorporated (Respondent) v. Employees (Objectors).

Unit: "all employees of the respondent engaged in cleaning at 600 and 620 Lolita Gardens, Mississauga, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff and persons regularly employed for not more than twenty-four hours per week." (7 employees in the unit). (*Having regard to the representations before it*).

**1770-76-R:** Teamsters Union Local 938, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Ronald A. Mills (Respondent).

Unit: "all employees of the respondent at Oshawa save and except foreman, persons above the rank of foreman, office staff and persons regularly employed for not more than 24 hours per week." (6 employees in the unit).

**1780-76-R:** Canadian Union of Public Employees (Applicant) v. Kingston Regional Hospital Laundry Incorporated (Respondent).

Unit: "all employees of the respondent at Kingston, Ontario, save and except office staff, supervisors, those above the rank of supervisor, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (71 employees in the unit). (*Having regard to the agreement of the parties*).



**1781-76R:** Ontario Nurses' Association (Applicant) v. The Norfolk Board of Education (Respondent).

Unit: "all registered and graduate nurses employed by the respondent in nursing capacity." (5 employees in the unit).

**1787-76-RL** Labourers International Union of North America, Local Union 493 (Applicant) v. Ajax Engineers Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1789-76-R:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. C.E.A. Simon-Day Ltd. (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1790-76-R:** United Steelworkers of America (Applicant) v. Gardette Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Port Colborne, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (16 employees in the unit).

**1792-76-R:** International Ladies Garment Workers Union (Applicant) v. Maytex Limited (Respondent).

Unit: "all employees of the respondent in Metro. Toronto, save and except foremen, foreladies, persons above the rank of foreman or forelady, office and sales staff, persons regularly employed for not more than twenty four hours per week and students employed during school vacation period." (24 employees in the unit).

**1795-76-R:** International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employee's and Bartenders' International Union, A.F.L. - C.I.O. - C.L.C. (Applicant) v. Georgian Motor Hotel (Oshawa) Limited (Respondent).

Unit: "all full time and part time male and female tapmen and bartenders; waiters and waitresses, glass washers, doorman/doorwoman, barboys and improvers employed by the respondent in Oshawa." (20 employees in the unit). (*Having regard to the agreement of the parties*).

**1796-76-R:** Labourers' International Union of North America, Local 493 (Applicant) v. E.S. Fox Limited Contractors, Engineers, Fabricators (Respondent).

Unit: "all construction labourers in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**1798-76-R** International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employee's and Bartenders' International Union, A.F.L. - C.I.O. - C.L.C. (Applicant) v. Dovercourt Tavern Limited Known as the Oakwood Hotel (Respondent).

Unit: "all full time and part time male and female tapmen and bartenders', waiters and waitresses, barboys, improvers and automatic dispenser operators employed by the respondent in Metropolitan Toronto, save and except managers and persons above the rank of manager." (5 employees in the unit).

**1800-76-R** Retail Clerks Union, Local 206 (Applicant) v. Canamerican Auto Lease and Rental Ltd. (Respondent).

Unit #1: "all employees of the respondent in Metropolitan Toronto and Mississauga, save and except supervisors, persons above the rank of supervisor, rental representatives, mechanics and office staff." (15 employees in the unit) (*Having regard to the foregoing*).

Unit #2: "all rental representatives of the respondent in Metropolitan Toronto and Mississauga, save and except supervisors and persons above the rank of supervisor." (18 employees in the unit). (*Having regard to the foregoing*).

**1801-76-R** Retail Clerks Union, Local 206 (Applicant) v. VS Services Ltd. (Respondent).

Unit: "all employees of the respondent at the premises of the Imperial Tobacco Company at 107 Woodlawn Road West in Guelph, save and except managers, persons above the rank of manager and persons employed in the respondent's vending division." (14 employees in the unit). (*Having regard to the foregoing and to the representations of the parties*).

**1802-76-R** Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L. - C.I.O. - C.L.C. (Applicant) v. Dees Beef Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Guelph, save and except foremen, persons above the rank of foreman, office staff, sales staff and students employed during the vacation periods." (21 employees in the unit).

**1804-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Greenwin Property Management (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 250 Davenport Road, Toronto, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (3 employees in the unit). (*Having regard to the agreement of the parties*).

**1817-76-R:** Sign & Pictorial Painters, Local 1630, International Brotherhood of Painters, & Allied Trades (Applicant) v. Plasti-Glo Products Limited (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week." (20 employees in the unit). (*Having regard to the agreement of the parties*).

**1827-76-R:** Amalgamated Meat Cutters and Butcher Workmen of North America (Applicant) v. Hoffman Meats Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Kitchener, Ontario, save and except foremen and dispatcher and those above the rank of foreman, office and sales staff and students employed during the school vacation period." (90 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note - see Report of full decision [1977] OLRB Rep. February*).

**1830-76-R:** Canadian Chemical Workers Union (Applicant) v. Drug Trading Company Limited (Respondent).

Unit: "all office and clerical employees of the respondent at 470 Midwest Road, Scarborough, save and except supervisors, persons above the rank of supervisor, sales staff and students employed during the school vacation period." (12 employees in the unit).

**1834-76-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233, 1304, 2480 and 2482, United Brotherhood of Carpenters and Joiners of America (Applicant) v. E.S. Martin Construction (Ontario) Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the county of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1836-76-RL** Canadian Union of Public Employees (Applicant) v. The Algonquin Nursing Home Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its nursing home in Mattawa, save and except assistant administrator, persons above the rank of assistant administrator and registered nurses." (26 employees in the unit). (*Having regard to the representations of the parties*).

**1840-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. Tas Alarm and Security Services (Respondent).

Unit: "all servicemen-installers employed by the respondent in the Municipality of Metropolitan Toronto, save and except supervisors and those above the rank of supervisor, telephone dispatchers, office and clerical workers." (5 employees in the unit). (*Having regard to the agreement of the parties*).

**1845-76-R:** 1845-76R: Labourers' International Union of North America, Local 183 (Applicant) v. Headway Corporation Limited (Respondent).

Unit: "all construction labourers employed by the respondent on residential construction in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Equeching, The Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1858-76-R:** Canadian Food & Allied Workers Local Union 175, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Shoppsy's Foods Limited (Respondent).

Unit: "all truck drivers of the respondent employed at and out of Metropolitan Toronto, save and except brokers, supervisors and persons above the rank of supervisor." (14 employees in the unit). (*Having regard to the agreement of the parties*).

**1859-76-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Convert-A-Wall Limited (Respondent).

Unit: "all carpenters, carpenters' apprentices, lathers and lathers' apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working fore-



men and persons above the rank of non-working foreman.” (4 employees in the unit). (*Having regard to the foregoing*).

**1860-76-R** Canadian Union of Public Employees (Applicant) v. The Doctors Hospital (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Unit: “all employees of the respondent in Metropolitan Toronto in the housekeeping department, save and except housekeeping supervisors, persons above the rank of housekeeping supervisor and persons regularly employed for not more than twenty-four hours per week.” (38 employees in the unit). (*Having regard to the agreement of the parties*).

**1868-76-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local 880 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. L & H Wood (Ontario) Limited (Respondent).

Unit: “all employees of the respondent in Windsor and the Township of Rochester, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (20 employees in the unit). (*Having regard to the agreement of the parties*).

**1869-76R:** Service Employees Union, Local 204 affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. St. Joseph’s Hospital, Brantford (Respondent) v. Ontario Nurses’ Association (Intervener).

Unit: “all lay office employees of the respondent in Brantford, save and except the Secretary to the Executive Director, the Secretary to the Director of Hospital Services, the Secretary to the Acting Personnel Manager, the Secretary to the Director of Nursing, the Secretary to the Materials Manager, the Payroll/Personnel Clerks, Supervisors, persons above the rank of Supervisor, persons regularly employed for not more than twenty four hours per week, students employed during vacation periods, employees covered by existing collective agreements and certificates of the Board, and registered technicians.” (20 employees in the unit). (*Having regard to the agreement of the parties*).

**1874-76-R** Laborers’ International Union of North America Local Union No.597 (Applicant) v. Frid Construction Company Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in the unit).

**1881-76-R** United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Asbestos Covering Company Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman”.(2 employees in the unit).

**1891-76-R** Labourers’ International Union of North America, Local 183 (Applicant) v. Thrurock Construction Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, The Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontar-

io, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**1892-76-R:** The International Union of Bricklayers & Allied Craftsmen Local #10 (Applicant) v. C.A. Pitts General Contractor Limited (Respondent).

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**1908-76-R-** The Carpenters' District Council of Toronto and Vicinity (Applicant) v. The Economy Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

### Applications Certified Subsequent to Pre-Hearing Vote

**1496-76-R:** Canadian Chemical Workers Union (Applicant) v. Inmont Canada Limited (Respondent) v. International Chemical Workers Union Local 612 (Intervener).

Unit: "all employees of the respondent employed at its facilities located at 10 Craig Street and 35 Greenwich Street, in Brantford, Ontario, save and except foremen, persons above the rank of foreman, chemists, assistant chemists and all other laboratory employees, engineers in training, office and sales staff, summer students in the Quality Control laboratory and persons regularly employed for not more than twenty-four (24) hours per week." (36 employees in the unit). (*Having regard to the foregoing*).

Number of names of persons on list as originally prepared by employer		36
Number of persons who cast ballots		32
Ballots segregated and not counted	2	
Number of ballots marked in favour of applicant	20	
Number of ballots marked in favour of intervener	10	

**1633-76-R:** Canadian Chemical Workers Union (Applicant) v. Canada Metal Company Limited (Respondent) v. International Chemical Workers Union, Local 424 (Intervener).

Unit: "all employees of the respondent working at the Upton Road Plant, save and except foremen, persons above the rank of foreman, office and sales staff." (44 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		48
Number of persons who cast ballots		47
Number of ballots marked in favour of applicant	44	
Number of ballots marked in favour of intervener	3	

**1690-76-R:** Canadian Chemical Workers Union (Applicant) v. Domtar Chemicals Limited Tar and Chemical Division (Respondent) v. International Chemical Workers Union (Intervener).

Unit: "all employees of the respondent at its plants in Hamilton, Ontario, save and except office staff including executive, managerial, sales and except office staff including executive, managerial, sales, engineering, laboratory, accounting and those above the rank of foreman, all stationary engineers, and all part time and temporary employees not engaged in permanent work." (32 employees in the unit).

Number of names of persons on list as originally prepared by employer		32
Number of persons who cast ballots	27	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	25	
Number of ballots marked in favour of intervener	1	

**1779-76-R:** Canadian Chemical Workers Union (Applicant) v. Drug Trading Company Limited (Respondent).

Unit: "all office and clerical employees of Drug Trading Company Limited at 15 Ontario Street, Toronto, save and except supervisors, persons above the rank of supervisor, sales representatives, personnel staff, computer operators and programmers, confidential secretaries, special assignments staff, persons covered by existing collective agreements, persons working less than twenty-four hours per week, and students employed during the school vacation period." (173 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		134
Number of persons who cast ballots	125	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	90	
Number of ballots marked against applicant	34	

## APPLICATIONS FOR CERTIFICATION DISMISSED

### No Vote Conducted

**0569-76-R:** Pharmacists and Professional Employees Association, Local 1976 (Applicant) v. Cedar Heights Drugs Ltd. (Respondent). (6 employees).

**0914-76-R:** Labourers' International Union of North America, Local 1089 (Applicant) v. Cope (Sarnia) Limited (Respondent) v. Sarnia Construction Assoc. (Intervener). (26 employees).

**0928-76-R:** Labourers' International Union of North America and its Local 1089 (Applicant) v. Martette Bros. Limited (Respondent) v. Sarnia Construction Assoc. (Intervener). (4 employees).

**0962-76-R:** Labourers' International Union of North America, Local 1089 (Applicant) v. McKay-Cocker Construction Limited (Respondent) v. Sarnia Construction Association (Intervener). (3 employees).



**1555-76-R:** Ontario Public Service Employees Union (Applicant) v. Charterways Transportation Limited, carrying on business as Two Cities Transit (Respondent). (100 employees).

**1848-76-R:** United Brotherhood of Carpenters and Joiners of America, Local 38 (Applicant) v. Milne & Nicholls Ltd. (Respondent). (5 employees).

### **Certification Dismissed Subsequent to Pre-Hearing Vote**

**1348-76-R:** Canadian Union of Industrial Employees (Applicant) v. Emanuel Products Limited (Respondent) v. International Woodworkers of America (Intervener).

Voting Constituency: "All employees of the respondent in Metropolitan Toronto, save and except shipper, receiver, foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (214 employees).

Number of names of revised voters' list	211
Number of persons who cast ballots	147
Number of ballots excluding segregated ballots cast by persons whose names appear of voters' list	147
<b>Ballot Box Sealed</b>	

**1588-76-R:** Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Acklands Limited Unapco (Division) (Respondent).

Voting Constituency: "All employees of the respondent company working at or out of Sudbury, Ontario, save and except shop foremen, office manager, outside sales staff (3) and branch manager." (25 employees).

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	21
Number of segregated ballots cast by persons whose name appear on voters' list	1
Ballots segregated and not counted	1
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	15

**1647-76-R:** United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC (applicant) v. Emery Industries Limited (Respondent).

Voting Constituency: "All of the employees in its business establishment located in London, Ontario, save and except foreman, persons above the rank of foreman, office and sales staff and laboratory technicians." (26 employees).

Number of names of persons on revised voters' list		25
Number of persons who cast ballots	22	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	5	
Number of ballots marked in favour of interested party	16	

**1707-76-R:** International Woodworkers of America (Applicant) v. Grien Furniture Transport (1974) Ltd. (Respondent).

Voting Constituency: "All employees of Grien Furniture Transport (1974) Ltd., Hanover, Ontario, save and except foremen, persons above the rank of foreman, dispatcher, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation." (16 employees).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	13	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	7	

**1745-76-R:** Canadian Chemical Workers Union (Applicant) v. Domtar Construction Materials Ltd. (Respondent) v. Local 603, International Chemical Workers Union (Intervener).

Voting Constituency: "All employees of the respondent at its Brantford, Ontario plant, save and except office staff, including clerical, sales, accounting and managerial office personnel, technical and laboratory staff, plant supervisory staff above and including the rank of foreman and all stationary engineers employed in the respondent's powerhouse." (74 employees).

Number of names of persons on list as originally prepared by employer		78
Number of persons who cast ballots	69	
Number of ballots marked in favour of applicant	12	
Number of ballots marked in favour of intervener	57	

**1746-76-R;** Canadian Union of Operating Engineers (Applicant) v. Silverwood Dairies, Division of Silverwood Industries Limited (Respondent) v. Milk and Bread Drivers, Teamsters Local Union No. 647 (Intervener).

Voting Constituency: "All employees of the company employed in or about the plants in the City of London, who come within the bargaining unit, except Engineers, office staff, Milk Route Foremen, Foremen, Foreladies, Ice Cream Territory Supervisors, and those above these ranks." (195 employees).

Number of names of persons on revised voters' list		193
Number of persons who cast ballots	168	
Number of spoiled ballots	1	
Ballots segregated and not counted	3	
Number of ballots marked in favour of applicant	31	
Number of ballots marked in favour of intervener	133	

### Certification Dismissed Subsequent to Post-Hearing Vote

**1647-75-R:** The Association of Allied Health Professionals: Ontario (Applicant) v. Orthopaedic and Arthritic Hospital (Respondent).

Unit: "All physiotherapists, occupational therapists, clinical pharmacist, dietitian, laboratory technician, pharmaceutical technician, orthotic technician, medical arts technician, accredited medical record librarian, photo technician and X-Ray technician of the respondent in Metropolitan Toronto, save and except those above the rank of assistant director." (26 employees in the unit).

Number of names of persons on list as originally prepared by employer		35
Number of persons who cast ballots	33	
Number of ballots marked in favour of applicant	13	
Number of ballots marked against applicant	20	

**1343-76-R** Upholsterers International Union of North America AFL/CIO/CLC (Applicant) v. Distinctive Upholstery Limited (Respondent) v. Group of Employees (Objectors).

Unit: "All employees of the respondent at the 111 Ronald Avenue Toronto, Ontario plant save and except foremen and those above the rank of foreman, office and sales staff." (35 employees in the unit).

Number of names of persons on list as originally prepared by employer		36
Number of persons who cast ballots	35	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	17	
Number of ballots marked against applicant	17	

### APPLICATIONS FOR CERTIFICATION WITHDRAWN

**1660-76-R:** International Association of Bridge, Structural & Ornamental Ironworkers Local Union 721 (Applicant) v. Arthur G. McKee Company of Canada Ltd. (Respondent). (14 employees).

**1760-76-R:** Ontario Housing Employees, Local 767, Canadian Union of Public Employees, O.F.L., C.L.C. (Applicant) v. Treal Building Maintenance Ltd. (Respondent). (15 employees).



**1760-76-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 765 (Applicant) v. Acier Armature de la Gatineau (Respondent). (3 employees).

**1785-76-R:** Labourers' International Union of North America Local 607 (Applicant) v. Telechem Limited (Respondent). (4 employees).

**1786-76-R:** Labourers International Union of North America Local 493 (Applicant) v. Marley Canadian Limited (Respondent). (2 employees).

**1815-76-R:** International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Argus Drywall Co. Ltd. and High Seven Construction Ltd., T/A Paragon Drywall Systems (Respondent). (27 employees).

**1821-76-R:** International Brotherhood of Electrical Workers Local Union 1687 (Applicant) v. Perwin Construction Co. Ltd. (Respondent). (10 employees).

**1823-76-R:** United Brotherhood of Carpenters and Joiners of America Local Union 93 (Applicant) v. J. Corda Const. Co. Ltd., (Respondent). (4 employees).

**1825-76-R:** Service & Commercial Employees Union, Local 272 affiliated with Hotel & Restaurant Employees and Bartenders International Union (AFL-CIO-CLC) (Applicant) v. The Ottawa Board of Education (Respondent) v. The Ottawa Board of Education Employees Association (Intervener). (825 employees).

**1839-76-R:** Retail, Wholesale and Department Store Union, AFL: CIO:CLC (Applicant) v. M. Loeb Limited (Respondent). (3 employees).

**1854-76-R:** Canadian Paperworkers Union (Applicant) v. Reed Decorative Products Limited (Respondent) v. Printing Specialties and Paper Products Union, Local 466 (Intervener). (11 employees).

**1862-76-R:** Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No.298 (Applicant) v. Structural Floor Finishing Limited (Respondent). (6 employees).

**1870-76-R:** United Steelworkers of America (Applicant) v. E.S.F. Limited, (Esso Home Comfort Station) (Respondent) v. Ready-Mix Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, Local 230 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener). (11 Employees).

## **APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS**

**7465-74-R:** Employees (Applicant) v. International Woodworkers of America (Respondent). (38 employees). (*Terminated*).

**1006-76-R:** Art Gooden (Applicant) v. Canadian Food and Allied Workers Local Union, 633, Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Respondent) v. Kingsville Foodliner Ltd. (Intervener).

- and -

**1009-76-R** Ron Gillett (Applicant) v. Canadian Food and Allied Workers Local Union 175, Chartered by The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Respondent) v. Kingsville Foodliner Ltd. (Intervener). (*Granted*).

Bargaining Unit: "all employees of the intervener at Kingsville, Ontario save and except the store manager and persons above the rank of store manager." (14 employees in the unit).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	14	
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	13	

**1414-76-R:** Verna Bell (Applicant) v. Amalgamated Clothing Workers of America Local 303 (Respondent). (*Granted*).

Unit: "all employees of the Employer at his plant located at 71 King Street, North, Waterloo Ontario, save and except the Complaint Supervisor, foremen, foreladies, persons above the ranks of foreman and forelady, office and clerical staff, persons employed in a confidential capacity or exercising supervisory responsibilities, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees completing their trial period." (29 employees in the unit).

Number of names of persons on list as originally prepared by employer		29
Number of persons who cast ballots	24	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	24	

**1431-76-R:** Stanley E. Paul (Applicant) v. Christian Labour Association of Canada (Respondent). (*Granted*).

Unit: "all employees of Canadian Hearing Society employed at its regional office in Hamilton, Ontario, save and except supervisors, and persons above the rank of supervisor." (3 employees in the unit).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	3	

**1513-76-R:** Edward Wright and Larry Vallas (Applicants) v. Teamsters, Chauffeurs, Warehousemen and Helpers Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent). (*Granted*).

Unit: "all employees of Fine Papers London Limited working at or out of London, County of Middlesex, save and except foremen, persons above the rank of foreman and office and sales staff." (30 employees in the unit).

Number of names on revised voters' list		25
Number of persons who cast ballots	25	
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	24	

**1515-76-R:** Janice Martin (Applicant) v. Christian Labour Association of Canada (Respondent) v. The Canadian Hearing Society (Intervener). (*Granted*).

Unit: "all employees of The Canadian Hearing Society in Metropolitan Toronto, save and except the Executive Director, persons above the rank of Executive Director and persons employed for not more than twenty-four hours per week." (21 employees).

Number of names of persons on revised voters' list		21
Number of persons who cast ballots	14	
Number of ballots marked in favour of respondent	2	
Number of ballots marked against respondent	12	

**1580-76-R:** Tom Bonvillain (Applicant) v. The Toronto Newspaper Guild, Local 87 of The Newspaper Guild (Respondent) v. Bargain Hunter Press Ltd. (Intervener). (24 employees). (*Dismissed*).

**1684-76-R:** Elizabeth (Betty) Smith (Applicant) v. Canadian Food and Allied Workers Local 725, chartered by Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C. (Respondent) v. S.S. Kresge Company Limited (Intervener). (348 employees). (*Dismissed*).

**1694-76-R:** Lab Technicians (Applicant) v. International Chemical Workers Union Local 612 (Respondent) v. Canadian Chemical Workers Union (Intervener). (3 employees). (*Terminated*).

**1720-76-R** William Darrach (Applicant) v. United Steelworkers of America (Respondent) v. Fielding Lumber Company Limited (Intervener). (4 employees). (*Granted*).

## APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

**1771-76-R** Local Union 636 - International Brotherhood of Electrical Workers, AFL-CIO-CLC (Applicant) v. The Public Utilities Commission of the City of Kingston (Respondent).

**1772-76-R:** Local Union 636 - International Brotherhood of Electrical Workers, AFL-CIO-CLC (Applicant) v. The Public Utilities Commission of the City of Kingston (Respondent).

**1774-76-R:** Local Union 636 - International Brotherhood of Electricals Workers (Applicant) v. Nanapanee Public Utilities Commission (Respondent).



**1775-76-R:** Local Union 636 - International Brotherhood of Electrical Workers, AFL-CIO-CLC (Applicant) v. Napanee Public Utilities Commission (Respondent).

**1776-76-R:** Local Union 636- International Brotherhood of Electrical Workers, AFL-CIO-CLC (Applicant) v. Gananoque Electric Light & Water Supply Company Limited (Respondent).

**1885-76-R:** Local Union 787 International Brotherhood of Electrical Workers (Applicant) v. The Public Utilities Commission of the City of St. Thomas (Respondent). (*Granted*).

### **APPLICATION FOR DECLARATION THAT LOCK-OUT UNLAWFUL**

**1274-76-U** Local Lodge 2506, International Association of Machinists and Aerospace Workers (Applicant) v. Ralph Milrod Metal Products Limited - ITT Canada Limited (Respondent).

- and -

**1276-76-U:** Local Lodge 2506, International Association of Machinists and Aerospace Workers (Applicant) v. Ralph Milrod Metal Products Limited - ITT Canada Limited (Respondent). (*Dismissed*).

### **APPLICATION FOR CONSENT TO PROSECUTE**

**1144-76-U:** Bechtel Canada Ltd. (Applicant) v. Antonio Attene, et al (See Schedule A attached hereto) (Respondents). (*Granted*).

### **COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE).**

**0545-76-R** Gail P. Ruuska (Complainant) v. Canadian Union of Public Employees and its local 87 (Complainant) v. Corporation of the City of Thunder Bay (Intervener). (*Terminated*).

**0751-76-U:** Communications Workers of Canada (Complainant) v. A.A.S. Telecommunications Ltd. and Zipcall Ltd. (Respondents).

- and -

**1037-76-U** Communications Workers of Canada (Complainant) v. A.A.S. Telecommunications Ltd. and Zipcall Ltd. (Respondents).

- and -

**1161-76-U** Communications Workers of Canada (Complainant) v. A.A.S. Telecommunications Ltd., and Zipcall Ltd. (Respondents). (*Dismissed*).

**0879-76-U** Robert Leroy Housser (Complainant) v. Amalgamated Transit Union Division 107 and Canada Coach Lines Ltd. (Respondents). (*Withdrawn*).

**1066-76-U:** Ontario Nurses' Association (Complainant) v. The Board of Health of Haliburton, Kawartha, Pine Ridge District Health Unit and H.E. Good (Respondents). (*Direction*).

**1162-76-U** United Garment Workers of America (Complainant) v. Four B Manufacturing Ltd. (Respondent). (*Granted*).

**1277-76-U:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L. C.I.O. C.L.C. (Complainant) v. Kitchener- Waterloo Hospital (Respondent). (*Dismissed*).

**1372-76-U:** Merlin Rebertz, Lance Langley, Vincent Harriot, Claude Brown and Josip Mitrovic (Complainants) v. Canron Limited, Eastern Structural Division (Respondent). (*Granted*).

**1449-76-U:** International Chemical Workers, Local 159 (Complainant) v. Kodak Canada Ltd. (Respondent). (*Granted*).

**1548-76-U:** Bakery & Confectionery Workers' International Union of America, Local 264 (Complainant) v. Sandra Instant Coffee Company Limited (Respondent). (*Granted*).

**1628-76-U:** Service and Commercial Employees Union, Local No. 272, affiliated with Hotel & Restaurant Employees and Bartenders International Union (AFL-CIO-CLC) (Complainant) v. Mrs. Elizabeth Johnson, Mrs. Patricia Gail Ginn and Mr. Edward Johnson, and the Ottawa Board of Education Employees Association (Respondents) v. The Ottawa Board of Education and Mr. A. Cummins, Director of Education (Interveners). (*Withdrawn*).

**1643-76-U** Claude Browne (Complainant) v. Canron Ltd., Eastern Structural Division (Respondent). (*Dismissed*).

**1650-76-U:** Canadian Union of Public Employees and its Local 1320 (Clerical Unit) (Complainant) v. Scarborough Centenary Hospital Association (Respondent). (*Withdrawn*).

**1653-76-U:** Service and Commercial Employees Union, Local No 272,affiliated with Hotel and Restaurant Employees and Bartenders International Union (AFL-CIO-CLC) (Complainant) v. The Ottawa Board of Education (Respondent). (*Withdrawn*).

**1675-76-U:** Upholsterers International Union of North America AFL/CIO (Complainant) v. Craftline Industries Limited (Respondent). (*Withdrawn*).

**1700-76-U:** Service & Commercial Employees Union, Local No.272, affiliated with Hotel & Restaurant Employees and Bartenders International Union (AFL-CIO-CLC) (Complainant) v. The Ottawa Board of Education (Respondent) v. The Ottawa Board of Education Employees Association (Intervener). (*Withdrawn*).

**1748-76-U:** Office and Professional Employees International Union, Local 81 (Complainant) v. Canadian Car Division Hawker Siddeley Canada Ltd. (Respondent). (*Withdrawn*).

**1749-76-U:** Office and Professional Employees International Union, Local 81 (Complainant) v. Canadian Car Division Hawker Siddeley Canada Ltd. (Respondent). (*Withdrawn*).

**1768-76-U:** International Woodworkers of America (Complainant) v. Grien Furniture Transport (1974) Ltd. (Respondent). (*Withdrawn*).

**1793-76-U:** Glen Ernest Carter (Complainant) v. Munisan Ltd. (Superior Sanitation) (Respondent). (*Dismissed*).

**1805-76-U:** Toronto Typographical Union No. 91 (Complainant) v. Inland Publishing Co. Ltd. (Respondent). (*Withdrawn*).

**1806-76-U:** Toronto Typographical Union No. 91 (Complainant) v. Inland Publishing Co. Ltd. (Respondent). (*Withdrawn*).

**1807-76-U:** Toronto Typographical Union No. 91 (Complainant) v. Inland Publishing Co. Ltd. (Respondent). (*Withdrawn*).

**1808-76-U** Toronto Typographical Union No. 91 (Complainant) v. Inland Publishing Co. Ltd. (Respondent). (*Withdrawn*).

**1809-76U:** United Steelworkers of America (Complainant) v. Jutra Die Casting Ltd. (Respondent). (*Withdrawn*).

**1814-76-U** Upholsters International Union of North America AFL/CIO (Complainant) v. Craftline Industries Limited (Respondent). (*Withdrawn*).

**1819-76-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Complainant) v. Lee Gasket Industries Inc. (Respondent). (*Withdrawn*).

**1824-76U:** Douglas E. Cox (Complainant) v. Canadian Johns- Manville Co. Ltd. (Respondent). (*Withdrawn*).

**1829-76-U-** United Cement, Lime and Gypsum Workers International Union, Local 487 (Complainant) v. General Concrete of Canada Ltd. (Hamilton Division) (Respondent). (*Withdrawn*).

**1831-76-U** Service Employees International Union Local 204 (Complainant) v. Kennedy Lodge Nursing Home (Respondent). (*Withdrawn*).

**1835-76-U:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers (Complaint) v. Thames Valley Beverages Limited (Respondent). (*Withdrawn*).

**1853-76-U:** Local Union 1687 International Brotherhood of Electrical Workers (Complainant) v. M.G. Burke Investments Limited (Respondent). (*Withdrawn*).

**1855-76-U:** International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employee's and Bartenders' International Union. A.F.L. -C.I.O.-C.L.C. (Complainant) v. Georgian Motor Hotel (Oshawa) Limited (Respondent). (*Withdrawn*).

**1872-76-U:** International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employee's and Bartenders' International Union. A.F.L.-C.I.O.-C.L.C. (Complainant) v. Egertons Restaurant and Tavern (Respondent). (*Withdrawn*).

**1877-76-U:** Marvin Billbreck (Complainant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Respondent). (*Withdrawn*).



**1878-76-U:** International Beverage Dispensers' and Bartenders. Union Local 280 of the Hotel and Restaurant Employee's and Bartender's International Union. A.F.L.-C.I.O.-C.L.C. (Complainant) v. Egertons Restaurant and Tavern (Respondent). (*Withdrawn*).

**1879-76-U:** Teamsters, Chauffeurs, Warehousemen & Helpers Union Local 91, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Ottawa Beef Co. Ltd. (Respondent). (*Withdrawn*).

**1895-76-U:** Marlene Leader (Complainant) v. Teamsters, Chauffeurs, Warehousemen & Helpers Local Union #880 (Respondent). (*Withdrawn*).

## **APPLICATION FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**1833-76-M:** The Lakehead Board of Education (Applicant) v. Service Employees Union, Local 268 (Respondent). (*Terminated*).

## **APPLICATION UNDER SECTION 55**

**1492-76-R:** Christian Labour Association of Canada (Applicant) v. St. Catharines Glass and Mirror Limited (Respondent). (*Granted*).

## **JURISDICTIONAL DISPUTES**

**7348-74-JD** The Carpenters District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227 and 3233 of the United Brotherhood of Carpenters and Joiners of America (Complainant) v. Gryd Construction Inc. The Manufacturers Life Insurance Company and Local 562, Wood, Wire and Metal Lathers International Union (Respondents) v. Interior Systems Contractors Association of Ontario and The General Contractors' Section of The Toronto Construction Association (Parties added by the Board.) (*Terminated*).

**1838-76-JD:** Douglas E. Cox (Complainant) v. Canadian Johns- Manville Co. Ltd. (Respondent). (*Withdrawn*).

## **APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)**

**0880-76-M:** Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Thunder Bay (Respondent). (*Withdrawn*).

**1176-76-M:** Office and Professional Employees International Union, Local 452 (Applicant) v. The Corporation of the City of Cornwall (Respondent). (*Granted*).

## APPLICATIONS UNDER SECTION 112A

**1172-76-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Crew Construction Limited (Respondent). (*Granted*).

**1202-76-M** Operative Plasters' & Cement Masons International Association Local 915 and Peter Vandenberghe (Applicant) v. Bechtel Canada Ltd. (Respondent). (*Withdrawn*).

**1342-76-M:** Local Union 47, Sheet Metal Workers' International Association (Applicant) v. Derrod Sheet Metal Mfg. Limited and the Mechanical Contractors' Association of Ottawa (Sheet Metal Division) (Respondents). (*Dismissed*).

**1427-76-M:** International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Univex (Canada) Limited, Electrical Contractors Association of Toronto (Respondents). (*Terminated*).

**1483-76-M:** Resilient Floor Workers Local 2965, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Darling Carpet Installations (Respondent). (*Withdrawn*).

**1593-76-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Dain Construction Ltd. (Respondent). (*Granted*).

**1615-76-M:** Labourers' International Union of North America, Local 527 (Applicant) v. Sandrin Precast Limited (Respondent). (*Granted*).

**1696-76M:** A Council of Trade Unions, acting as the representative and agent of Teamsters' Local Union 183 (Applicant) v. The Metropolitan Toronto Road Builders' Association (Respondent). (*Withdrawn*).

**1742-76-M** International Union of Operating Engineers, Local 793 (Applicant) v. Hugh Matern Contracting Limited (Respondent). (*Withdrawn*).

**1909-76-M** Local 18, United Brotherhood of Carpenters & Joiners of America on behalf of Shop Steward (Robert Ducharme) (Applicant) v. Barclay Construction Hamilton Limited (Respondent). (*Withdrawn*).

**1915-76-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Municipal Plumbing and Heating Limited and The Metropolitan Plumbing and Heating Contractors Association, A Division of The Mechanical Contractors Association of Toronto (Respondents). (*Withdrawn*).

**1916-76-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Municipal Sheet Metal & Air Conditioning (Toronto) Limited and The Mechanical Contractors Association of Toronto (Respondents). (*Withdrawn*).

**1925-76-M:** Labourers' International Union of North America, Local 1089 (Applicant) v. Standard Machine & Equipment Contractor Limited (Respondent). (*Withdrawn*).

**1931-76-M:** Labourers' International Union of North America, Local 506 (Applicant) v. The General Contractors Section of The Toronto Construction Association & Comstock International Limited (Respondents). (*Withdrawn*).

**1934-76-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Toronto Formwork Association and Commerce Masonry & Forming Ltd. (Respondents). (*Withdrawn*).

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**0076-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Belmont Concrete Finishing Co. Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasters' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3). (*Request Denied*).

**0077-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Duron Ontario Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasters and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3) v. The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Intervener #4). (*Request Denied*).

**0078-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Dean-Chandler Waterproofing Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of United States and Canada (Intervener #2). (*Request Denied*).

**0079-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Chemello Construction Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3) v. The Carpenters' District Council of Toronto and Vicinity on Behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of Carpenters (Intervener #3). (*Request Denied*).

**0080-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Armoured Floor Company Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3). (*Request Denied*).

**0081-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Structural Floor Finishing Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers and Cement Masons' International Association of the United States and Canada (Intervener #2). (*Request Denied*).

**0093-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Vanguard Floors Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers and Cement Masons' International Association of the United States and Canada (Intervener #2). (*Request Denied*).



ciation (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2). (*Request Denied*).

**0095-76-R:** Labourers' International Union off North America, Local 183 (Applicant) v. Eastern Construction Company Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2). v. Labourers' International Union of North America, Local 506 (Intervener #3) v. The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, and 3233 (Intervener #4) v. Ironworkers Local 721 (Intervener #5). (*Request Denied*).

**0120-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Leader Structures (Toronto) Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3) v. Ironworkers, Local 721 (Intervener #4). (*Request Denied*).

**0125-76-R:** Labourers' International Union of North America, Local 183 Applicant v. Western Waterproofing Company of Canada Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2). (*Request Denied*).

**0137-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Ellis-Don Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3) v. Ironworkers Local 721 (Intervener #4). (*Request Denied*).

**0138-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. United Floor Company Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers and Cement Masons' International Association of the United States and Canada (Intervener #2). (*Request Denied*).

**0139-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. The Foundation Company of Canada Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons, International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3) v. Ironworkers Local 721 (Intervener #4). (*Request Denied*).

**0198-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Vanbots Construction Co. Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3). (*Request Denied*).

**0209-76-R** Labourers' International Union of North America, Local 183 (Applicant) v. Gibraltar Floors of Canada Ltd. (Respondent) v. The General Contractor's Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2). (*Request Denied*).

**0221-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Relcon Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #). (*Request Denied*).

**0222-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Diplock Durable Floor Company Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Labourers' International Union of North America, Local 506 (Intervener #3). (*Request Denied*).

**0224-76R:** Labourers' International Union of North America, Local 183 (Applicant) v. V.K. Mason Construction Ltd. (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers and Cement Masons' International Association of the United States and Canada (Intervener #2) v. Carpenters' District Council of Toronto on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 (Intervener #4). (*Request Denied*).

**1621-76-R:** International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union. A.F.L.-C.I.O. -C.L.C. (Applicant) v. Egerton's Restaurant (Respondent). (*Request Denied*).

**1727-76-R:** International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Paragon Drywall Systems (Respondent). (*Request Denied*).

**1815-76-R:** International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Argus Drywall Co. Ltd. and High Seven Construction Ltd., T/A Paragon Drywall Systems (Respondent) (*Request Denied*).

**1668-76-U** Ontario Nurses' Association (Complainant) v. St. Joseph's Hospital (Respondent).  
- and -

**1706-76-U** Ontario Nurses' Association (Complainant) v. St. Joseph's Hospital (Respondent). (*Section 79*). (*Request Denied*)

**1644-76-M** International Association of Machinists and Aerospace Workers (Applicant) v. Worthington Canada Ltd. (Respondent). (*Section 95(2)*). (*Request Denied*).

DISPOSITION OF 112a APPLICATIONS  
BETWEEN  
JULY 18, 1975 AND DECEMBER 31, 1976

**TABLE I**

Number of Section 112a Applications Received per Month from July 18, 1975 up to and including Dec. 31, 1976

Period	No. of Cases
July 18-31, 1975	1
August	0
September	1
October	6
November	9
December	16
January 1976	24
February	4
March	15
April	13
May	14
June	33
July	50
August	19
September	13
October	15
November	24
December	34
<b>TOTAL</b>	<b>291</b>



**TABLE 2** Categories of Grievances in s. 112a Applications\*

(1) Discharge, discipline	20
(2) Non-payment of employer contributions to Welfare/Pension/ Vacation Pay Fund; of Union dues	73
(3) Non-payment of wages, (incl. payment at improper rate, non-payment of travel expense, etc.)	46
(4) Non-remittance of union dues from employer's payroll	6
(6) Employment of non-union worker to do union work	76
(6) Improper Subcontracting	14
(7) Section 1(4)	3
(8) Lay-off, violation of seniority provisions of collective agreement	11
(9) Unlawful strike/unlawful lock-out	7
(10) Miscellaneous	18
(11) Unknown	1
Total types of grievances raised	275

\*Decision based on application *only* and evaluated only on those applications received prior to Dec. 1, 1976. This cut-off date was established because a high percentage of December 1976 applications were still in progress and the files therefore were not readily available.

Up until Nov. 30, 1976 the total number of 112a applications filed was 257. In evaluating these files, we found instances in which more than one type of grievance was alleged by the applicant. In the evaluation, we limited the categories of grievances for any one application to three types in spite of the fact that in only a few applications (4) more than two types of grievances were alleged.

**TABLE 3** Status or Method of Disposition of Applications received from July 18, 1975 up to and including November 30, 1976

Total cases received	Settled	Withdrawn	Sine die	Settled but jurisdiction retained	Adjudicated	Files unavailable for analysis
257	128	31	37	19	31	11

- 1. Settled**—cases withdrawn after having been settled by the parties, as evidence by:  
the Labour Relations Officers Report;  
or an agreement filed;  
or a Board order;  
or correspondence from the parties.
- 2. Withdrawn**—cases withdrawn with no information on settlement.
- 3. Sine die**—cases in which the parties have mutually agreed that the application be adjourned.
- 4. Settled but jurisdiction retained**—cases in which the parties have settled their differences but wished the Board to retain jurisdiction for a period not exceeding one year unless notified by the parties to the contrary.
- 5. Adjudicated**—cases heard by the Board (i.e., evidence led, arguments presented) and does not include those instances where the Board merely incorporated settlement terms into an order.

**TABLE 4**Time lapse between date of 1st board hearing and date of adjudication<sup>1</sup>

Time Lapse (Calendar days)	No. of Cases
Under 14 days	9
14-28 (incl.)	3
29-42	1
43-56	3
57-70	8
71-84	3
85-98	0
99-119	0
120-140	0
141-161	1
162-182	0
Over 182 days	1
Unavailable for analysis	2
<b>TOTAL</b>	<b>31</b>

<sup>1</sup>Relating to applications received from July 18, 1975 up to and including Nov. 30, 1976.**TABLE 5**Time lapse between date of receipt and date of adjudication<sup>1</sup>

Time Lapse (Calendar days)	No. of Cases
under 14 days	0
14-28 (incl.)	7 <sup>2</sup>
29-42	2
43-56	3
57-70	2 <sup>2</sup>
71-84	1 <sup>2</sup>
85-98	5
99-119	6
120-140	0
141-161	2 <sup>2</sup>
162-182	0
over 182 days	1
Unavailable for analysis	2
<b>TOTAL</b>	<b>31</b>

NOTE: From an analysis of the cases it appears that in many instances the time lapse between the date of receipt and date of adjudication is attributable to adjournments on consent by the parties.

<sup>1</sup> Relating to applications received from July 18, 1975 up to and including Nov. 30, 1976.

<sup>2</sup> Several of these cases proceeded to reconsideration but the time from original adjudication to reconsideration is not included.



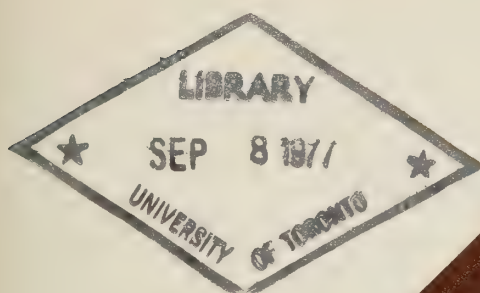
Ontario

Relations Board

# Decisions April 77

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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1977] OLRB REP.**

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.





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**Section 79 – Employee – whether complainant owner/operators of trucks are dependent contractors.**

**BEFORE:** Donald D. Carter, Chairman, and Board Members J.D. Bell and P.J. O’Keeffe.

**APPEARANCES:** *E.G. Posen and A. Natale for the complainants; Stanley Simpson and L. Schultz for the respondent union; Thomas J. Rocchi for the respondents Pasinato and Adbo Contracting Co. Ltd.*

**DECISION OF THE BOARD:** April 6, 1977

1. These complaints had their origin in a complaint brought by the Ontario Haulers Association Inc. seeking general remedial relief under section 79 of the *Labour Relations Act* on behalf of a number of named grievors. A question arose at the outset of the hearing as to whether the Ontario Haulers Association, an incorporated association which had not established status as a trade union, had the necessary standing to obtain relief for the named individuals. We ruled that the Ontario Haulers Association, not having established that it was “an organization of employees formed for purposes that include the regulation of relations between employees and employers”, had not established a sufficient interest in the matter to give it status as a complainant. This ruling stemmed from our concern that the mere filing of a complaint by the Ontario Haulers Association did not establish that it was in fact acting on behalf of the individuals set out in the schedule attached to the application. Although this conclusion can be drawn where a complainant has established its status as a trade union, it cannot flow in the same manner from the filing of a complaint by an entity other than a trade union, where there is absent any evidence as to whether that entity actually represents those on whose behalf it purports to seek a remedy.

2. In this case, although we were unable to find that the Association had a sufficient interest to act as a complainant, we were prepared to amend the style of cause by substituting the names of the individual grievors, provided it could be established that those individuals wished to seek remedial relief from the Board. Our finding is that Corrado Di Sabatino, S. Ippolito, Louis Fidanza, Joseph K. Joseph, and Antonio Di Giammatteo did wish to pursue a complaint before this Board. The style of cause in this application, therefore, is amended by deleting Ontario Haulers Association Inc. as the complainant and substituting the names of the five persons set out above.

3. The name “Leonard Schuetz” appearing in the style of cause as the name of a respondent is amended to read: “Leonard Schultz”.

4. The name “Louigi Pasinato” appearing in the style of cause as the name of a respondent is amended to read: “Luigi Pasinato”.

5. The first question to be addressed in this matter is whether the individual complainants, owner-drivers of dump trucks are employees within the meaning of the *Labour Relations Act* - a necessary condition for the granting of relief by this Board. The position taken by the respondents was that these individuals functioned as independent businessmen and, therefore, fell outside the scope of our jurisdiction. Although counsel for all interested parties agreed that the status of these individuals was the first issue to be resolved, there was no agreement on the order in which the evidence pertaining to this issue should be presented. Counsel for the individual complainants pressed strongly the position that, by virtue of section 79(4a) of the Act, the burden of proof and, hence, the obligation to proceed first rested upon the respondents. This argument was less than persuasive.

6. The most serious flaw in the argument is that it presupposes the status of the complainants. Their status, however, is the very question that must be resolved initially, since the complainants must be employees to fall within the protections of the *Labour Relations Act*, and is different in kind than the question dealt with by the Board in *I.C.B. Warehouseing*, [1976] OLRB Rep. Oct. 621, where the Board simply had to determine whether the termination of a particular employee contravened the Act. The Board held that, in the circumstances, a complainant was not required to establish a *prima facie* case of a violation of one of the provisions of the Act before the employer was subject to the reverse burden of proof under section 79 (4a). Section 79 (4a) was interpreted as imposing only one burden of legal significance - the burden upon the employer to establish that it did not contravene the Act.

7. This interpretation of the reverse onus section has been reflected in the order of proceeding at the hearing. Given the location of the burden of proof in this type of case, the Board has adopted, as a standard practice, the procedure of having an employer proceed first to provide some evidence in the way of an explanation to meet the particulars of the complainant's allegation. This order of proceeding, however, applies only where the issue is one falling within the purview of section 79 (4a).

8. The issue that we are dealing with in the instant case is one relating to the Board's general jurisdiction. Section 79 (4a) is clearly not applicable to this question and, therefore, the order of proceeding must be governed by other considerations. Here, the most important consideration is that the individual complainants appeared to have better access to the evidence relevant to the issue of their status under the Act than any one of the respondents. Since the totality of the economic position of the complainants could be better set out through their own evidence, we ruled that it was appropriate for the complainants to proceed first in presenting their case.

9. The evidence revealed that the five complainants were in very similar economic positions. Up until the time at which the conduct giving rise to these complaints arose, the five earned their living by hauling various loads in their own dump trucks, each of the complainants operating only one truck at any particular time. In other words, the complainants were owner-drivers, supplying a vehicle and their own services to drive that vehicle.

10. Most of these owner-drivers did not own their truck outright, having obtained financing for the vehicle through their own efforts. The owner-driver not only bore the expense of this financing, but also all of the other expenses associated with the operation of



the vehicle. All license fees, insurance premiums, maintenance bills, and fuel bills were paid for by the complainants. All of the costs were treated by the complainants as expenses for the purpose of calculating their income tax.

11. The complainants obtained almost all of their work through persons who styled themselves as "brokers". The respondent Luigi Pasinato was one of these brokers. Four of the complainants, Fidanza excepted, relied upon Pasinato almost exclusively to supply them with work, although there was no legal impediment to prevent them from obtaining work through other brokers, or from contractors directly.

12. Pasinato would first obtain work through his contacts with contractors and other organizations, and then allocate that work to the owner-drivers. On most occasions, Pasinato would contact the owner-driver by telephone on the evening before the job, instructing that person on where and when to report. Sometimes, however, it would be the owner-driver who would initiate the phone call. Once the work was assigned, Pasinato's supervisory role was minimal. On the job site, it would be the contractor, such as the respondent Adbo, that would instruct the owner-drivers as to how the work was performed. These instructions in the main consisted of telling where the owner-drivers should receive their loads and where they should take them. Pasinato did appear on the site from time to time to determine if there were any complaints from his customers and, at times, instructed the owner-drivers to wear required safety equipment.

13. The remuneration for any work performed came from Pasinato. Hours worked were accounted for on forms that were supplied by Pasinato. At the end of each working day, the owner-driver would fill out one of these forms, indicating the location of the job, the starting time for the job, and the finishing time. The foreman on the job site and the owner-driver would sign the bill, and a copy would be retained by each person. If any disagreement over the number of hours worked arose, the matter would be resolved between the foreman and the owner-driver. Every two weeks the owner-drivers would take these bills to Pasinato for payment. Pasinato would then pay the owner-drivers at an hourly rate of \$14.00 for the hours recorded on the bills. An attractive feature of this arrangement for the owner-drivers was that payment would be made by Pasinato regardless of whether he could collect from the person for whom the work was performed.

14. The owner-drivers received no remuneration from Pasinato other than the hourly payments, and no amounts were deducted from these payments other than, in some cases, dues paid to the respondent union. No holiday pay, vacation pay, or contributions to welfare and pension plans were provided by Pasinato. Neither Pasinato nor the owner-drivers made any payment to workmen's compensation, unemployment insurance, or the Canada Pension Plan. Income tax payments were not deducted from the amounts paid by Pasinato.

15. The respondent Pasinato, rather than the owner-drivers, dealt with those persons who actually provided the work. At one time Pasinato had owned a fleet of dump trucks and had employed drivers to operate these trucks. These trucks and drivers were supplied to various customers on a contract basis. In 1973, Pasinato altered the nature of his business by selling his trucks and becoming a truck broker. However, he continued to deal with his same customers, trading on the reputation that he had built up as a contractor.



16. As a broker, Pasinato's ability to obtain work depended on two factors – price and service. A rate would be negotiated between Pasinato and those persons having work to be performed. Pasinato would then negotiate a rate, obviously lower, with the owner-drivers. The difference between these two rates represented Pasinato's profit. The success of Pasinato's business depended on his ability to please his customers and to retain a pool of reliable owner-drivers. Pasinato would visit the job sites regularly in order to deal with any customer complaints. The trucks supplied by him carried his name in order that the customers would deal with Pasinato if problems arose. In order to maintain his relationship with the owner-driver, when work was scarce (as it was during the winter), Pasinato would attempt to allocate the work fairly among his regular owner-drivers. The guarantee of payment, already mentioned, was another way in which Pasinato was able to retain a pool of reliable owner-drivers.

17. This case requires us to explore the outer limits of the *Labour Relations Act*. The purpose of this statute, as set out in its preamble, is to "further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees". The Act itself provides a structure for the organization of individual workers into combinations. Collective action by workers, once regarded as amounting to an illegal conspiracy, has been legitimized, the underlying rationale being the need to protect the individual employee from the worst extremes of the labour market. The countervailing power of collective bargaining can now be used by workers to obtain improved wages, hours of work, and other working conditions.

18. The *Labour Relations Act*, however, was never intended to insulate entrepreneurs from economic competition by allowing that class of person to act in combination. Such combinations not only fall outside the purview of collective bargaining legislation, but they are also expressly restricted by the federal *Combines Investigation Act*. Collective bargaining policy, thus, expressly encourages combinations, while competition policy operates in the opposite direction. Given these two quite different policies, it then becomes important to identify the outer limits of our own statute, the *Labour Relations Act*.

19. The task of distinguishing between the individual worker and the true entrepreneur has never been easy. There exists an economic spectrum – coloured at one end by the true entrepreneur and at the other end by the individual worker. These two points of the spectrum can be identified clearly. The businessman who sells goods, and employs others to produce these goods, is clearly not entitled to use the *Labour Relations Act* for the purpose of forming a combination with other businessmen. On the other hand, it is clear that the worker who supplies only his own labour to an employer is entitled to organize with other workers under the Act. At the shaded area toward the middle of the economic spectrum, however, it becomes difficult to draw a distinction.

20. The problem of drawing a distinction in this area is not a new one for this Board. The case of *Livingston Transportation Ltd.*, [1972] OLRB Rep. May 488 provides a good example of the difficulties faced by the Board when determining the outer limits of the Act. The question before the Board was whether certain truck owners were employees or independent contractors. In answering that question, the Board alluded to no less than four approaches that might be taken:

- 1) resort to the control test used for determining the vicarious liability of an employer;
- 2) use of the four-fold test adopted by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.*, et al [1947] 1 D.L.R. 101, a case concerning liability for municipal taxation;
- 3) simply asking the question of whose business is it;
- 4) application of what was referred to as “the statutory purpose test”.

The multiplicity of approaches that emerged in the *Livingston* case is some evidence of the problems that then faced the Board when identifying the outer limits of the Act. Fortunately, there is now a new point of departure for distinguishing between the individual worker and the true entrepreneur.

21. The *Labour Relations Act*, having been amended in 1975, now provides a single, and less confusing, approach to the problem. Section 1 of the Act has been amended to provide that the term “employee” includes a “dependent contractor”. That same section defines dependent contractor as “a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of independent contractor”. Section 6 of the Act, moreover, has been amended to provide that “[a] bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit”.

22. We do not construe the inclusion of these provisions in the Act as merely amounting to a legislative attempt to codify the Board’s existing jurisprudence, such as *Livingston Transportation*. In those cases, the question had to be framed in terms of whether a person was an employee or an independent contractor. The Board, as a result, placed emphasis on the four-fold test as set out in *Montreal Locomotive Works*. The appropriateness of this test for determining the outer limits of a collective bargaining statute was always questionable. This concern has been best put by Dean Arthurs in his perceptive article, “The Dependent Contractor: A Study of the Legal Problems of Countervailing Power” (1965), U.T.L.J. 89. At page 94, he comments:

Whether the “control” or the “fourfold” test is the more appropriate for identifying the “master-servant” relationship is not here material. The pertinent question is whether the factors in an employment relationship which invoke vicarious liability bear any relation to those which invite a régime of collective bargaining. The very terminology – “master” and “servant” – evokes a nostalgic Victorian image of authoritarianism which is collective bargaining’s antithesis. More important, any rationale of vicarious liability focuses ultimately on the allocation of loss as between employer and injured



third party, and not on the rights and duties of employers and employees, *inter se*. The control test and its modern successor, the fourfold test, are thus intended to identify those features of the employment relationship which will permit the employer to escape liability if he falls outside the rationale of vicarious liability. Control may be important if vicarious liability is based on a desire to discourage negligent work practices; use of the employer's tools or financial independence upon him may be important if vicarious liability is based on a desire to reach the employer's "deep-pocket," or on a "loss-spreading" rationale. But the relevance of any of these considerations to situations where no third party is present is purely fortuitous. The rationale of labour relations legislation is that the public interest is best served by the promotion of collective bargaining between employers and their employees. Surely any meaningful definition must be formulated in the light of this statutory purpose. Indeed, the Ontario Board in the *Telegram* case recognized this fact: "[T]he elements to be considered are not alone those that were established for the purpose of determining whether an employer is vicariously responsible for the tortious acts of his servants, but those as well that have a bearing on the labour relations aspects of the relationship. ..." Yet the *Montreal Locomotive* test was adopted by the Ontario board in the *Telegram* case, and has been followed ever since.

23. The question that must now be answered by the Board is, not whether a person falling within the shaded area on the economic spectrum is an employee or an independent contractor, but whether that person is a dependent contractor. This new point of departure does not mean that considerations formerly taken into account are now totally irrelevant. The statutory definition of dependent contractor clearly requires some reference to the employee-independent contractor distinction. A shift of emphasis has occurred, however, as this new definition recognizes that persons in an economic position closely analogous to that of the employee should also enjoy the benefits of collective bargaining. The determination of who is a dependent contractor is now a comparative exercise that requires reference to a much broader range of labour relations considerations.

24. This redefinition of the limits of the *Labour Relations Act* serves two purposes. First, it recognizes that, as a matter of fairness, persons in economic positions that are closely analogous should be given the same legislative treatment. A second purpose, and one no less important, is to protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship. These two considerations provide the justification for the shift of emphasis.

25. The shift of emphasis is readily apparent from a reading of the definition of dependent contractor. Clearly a person need not be employed under a contract of employment to be considered as a dependent contractor, and provision of tools, vehicles, equipment, machinery is no longer a major consideration. Contractual form and the ownership of tools are no longer essential considerations. The emphasis, instead, is placed upon economic and business factors. Both the type of economic dependence that exists, and the kind of business relationship entered into, determine whether a person more closely resembles an employee than an independent contractor.



26. Economic dependence must be such that it puts the person in roughly the same economic position as an employee who must face the perils of the labour market. Mere economic vulnerability, however, is not a sufficient basis for a finding that a person is a dependent contractor, since this is a condition that may be experienced by the true entrepreneur, just as much as the individual worker. There must exist, therefore, a type of economic dependence closely analogous to that of the individual worker.

27. This first requirement of a particular type of economic dependence is closely related to the second requirement of a particular kind of business relationship. In order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but also must be "under an obligation to perform duties for that person" roughly analogous to that of an employee. This reference in the statutory definition requires us to look beyond the factor of economic dependence to the form of the business relationship to determine if it is roughly analogous to that of employer and employee. Such an examination, however, need not result in the identification of a particular contractual obligation, since a business relationship may exist, and continue, in the absence of any particular contractual obligation. The Board, therefore, need not confine itself to this very narrow issue but may deal with the wider issue of the nature of the business relationship.

28. In the instant case, the facts point to the complainants being dependent economically upon the respondent Pasinato. This economic dependence arose because Pasinato, and the other brokers like him, were the almost exclusive source of work for the complainants. Four of the complainants, moreover, had relied upon Pasinato almost exclusively to supply them with work during the year prior to the events giving rise to this complaint. The fact that the relationship between Pasinato and Fidanza may have been more transitory, moreover, does not necessarily put it outside the purview of section 1 (ga) of the Act. The question is whether the economic dependence is roughly analogous to that of the employee working in the same economic sector. Fidanza, and the other complainants, were all performing work in the construction sector, an area in which employment relationships have always been less permanent than in the industrial sector. Using this analogy, we find that in this case the transitory nature of the relationship between Fidanza and Pasinato does not make Fidanza any less a dependent contractor than the other four complainants.

29. Not only did Pasinato, and the other brokers, control the source of work through the contacts they had built up, but they also controlled the remuneration to be paid the complainants for performing that work. The complainants dealt with Pasinato, and not the persons from whom the work initially emanated. Although these persons might influence the rate paid to the complainants through their negotiations with Pasinato, it was Pasinato who ultimately set the rate for the complainants. If the complainants wished to improve their economic lot, they had to look to Pasinato, and not to the persons with whom Pasinato dealt. This situation was not unlike that of those persons whom Pasinato had once hired to drive his own trucks, the only difference being that the complainants supplied an asset of considerable value in addition to their own labour. This comparison, therefore, leads us to conclude that there exists for the complainants in this case a type of economic dependence more closely resembling that of employee than that of an independent contractor.

30. The close analogy between the complainants and employees becomes even more evident upon examining the business relationship between Pasinato and the complainants.

The complainants were very much integrated into Pasinato's business. There existed an organizational dependence on the part of the complainants that extended well beyond what might exist between businessmen. The complainants depended upon Pasinato to obtain work through the contacts that he had built up as a businessman. The goodwill that existed belonged to Pasinato, and not to the individual complainants. It is not surprising, therefore, that Pasinato wished to have the complainants identify their trucks as Pasinato's. Collection of accounts with the various contractors was Pasinato's sole responsibility, since the complainants were paid regardless of whether Pasinato could collect these accounts. Pasinato even supplied the forms used to account for hours of work. Pasinato, although he did not directly supervise the complainants, was still able to exercise substantial control over them through his power to assign work. The work actually performed, moreover, appeared to require little in the way of direct supervision. All of these facts point to the complainants being an integral part of Pasinato's business organization. The complainants supplied only their own labour and the tools of their trade, depending on Pasinato to provide the entrepreneurial skills. We, therefore, conclude that the business relationship between the complainants and Pasinato is one more closely resembling the relationship of an employee than that of an independent contractor.

31. Our conclusion is that the five complainants, being dependent contractors, are covered by the *Labour Relations Act*. Accordingly, we will proceed to deal with the merits of the complaints filed by these complainants.

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**1568-76-U Libby, McNeill & Libby of Canada, Limited(Applicant), v. United Automobile, Aerospace & Agricultural Implement Workers of America and others as listed on attached page, (Respondent).**

**Strike – effect of rollback on collective agreement silent respecting federal guidelines but providing for compensation in excess of guidelines – whether strike threat to force implementation of agreement prior to rollback unlawful.**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members E. Boyer and J.E.C. Robinson, Q.C.

**APPEARANCES:** *W.G. Phelps and E.R. Oke for the applicant; L.A. MacLean and D.C. Kean for the respondent.*

**DECISION OF PAMELA C. PICHER, VICE-CHAIRMAN AND BOARD MEMBER E. BOYER: April 29, 1977.**

1. This is an application under section 82 of The Labour Relations Act. The employer requests the Board to issue a declaration that the union has threatened an unlawful strike and a direction to cease and desist from such threats.

2. At one time three related complaints were before this panel, two applications filed under section 79 of the Act (one initiated by U.A.W. Local 35 and another by U.A.W.

Local 251) in addition to the instant application under section 82. While the Board was in the process of hearing the section 79 applications, the Anti-Inflation Board rendered its decision to rollback the compensation package of the collective agreement in question. In response to the rollback, the union, with the consent of the Board and the company, withdrew the applications. An agreement was made between the parties, however, that the evidence which had already been heard by the Board with respect to the section 79 complaints would be applied as evidence in the section 82 application.

3. On the basis of all the evidence the Board makes the following findings of fact, most of which are agreed to by both parties. A few areas of disagreement are noted.

- (1) Collective agreements between the applicant company on the one hand and U.A.W. locals 35 and 251 respectively, on the other hand, effective from November 1, 1973, expired on or about October 31, 1976.
- (2) Between August and November, 1976 representatives of U.A.W. locals 35 and 251 met with representatives of the employer for the purpose of concluding a new collective agreement. Mr. Russel Oke was the applicant's negotiator; Mr. Ed Carney was the negotiator for local 35, Mr. Clarence Carroll negotiated on behalf of local 251 and Mr. Douglas Kean, the U.A.W. international representative servicing locals 35 and 251, was present at the negotiations.
- (3) At the initial negotiating meeting on August 3, 1973 Mr. Kean stipulated that neither the memorandum of settlement nor the collective agreement could contain any mention of the A.I.B. Mr. Oke testified that he said that the company was not concerned whether or not a reference to the A.I.B. appeared in the collective agreement or in the memorandum of settlement but said that he indicated that the company intended to abide by the law as the company understood it. While Mr. Lewis Holly, the manager of personnel and industrial relations for the applicant, confirmed that Mr. Oke made this statement, Mr. Kean testified that he does not remember it. As a resolution of this disagreement will not affect the outcome of this case we will simply take note of the disagreement with the indication that even if Mr. Oke said that the company intended to abide by the law the statement is ambiguous and would certainly not have the effect of modifying a memorandum of settlement or collective agreement which the parties concluded without reference to the A.I.B.
- (4) Following a no-board report released on or about September 29, 1976 the employees in the bargaining units of locals 35 and 251 engaged in a lawful strike commencing November 3, 1976. On November 19, 1976 the parties signed a memorandum of agreement subject to ratification. No reference to the A.I.B. was made therein.
- (5) By letter dated November 22, 1976 Mr. Kean notified the company of the ratification of the agreement by locals 35 and 251. By letters dated November 22, 1976 as well Mr. Oke informed Mr. Kean of the



company's ratification stating that the agreement would take full effect as provided in the memorandum.

- (6) By letters to Mr. Carroll (local 251) and Mr. Carney (local 35) dated November 30, 1976 Mr. Oke advised the unions of the company's position that it would be illegal for the company to pay an amount in excess of the guidelines and that it thereby intended to withhold the excess until A.I.B. approval was received. Mr. Kean testified that this letter was the first time that there had been any indication that the agreement would not be fully implemented. Having regard to the existence of the above noted disagreement the Board notes that it is satisfied that it was at least the first time such a position on behalf of the company had been communicated to the union unequivocally and formally.
  - (7) On February 9, 1977 an official from the A.I.B. informed the company that the settlements reached between the employer on the one hand, and locals 251 and 35, respectively, on the other had been rolled back by the A.I.B. The parties agree that the rollback was between 2 and 4 percent.
4. The evidence with respect to the strike threats alleged to have been made by Mr. Kean is as follows:
- (1) Mr. Oke testified that in a conversation on December 2, 1976 with Mr. Kean, Mr. Kean said that unless the company reversed its position it would be in big trouble, that he would get strike authorization and that by next week everyone would be back on strike again. Mr. Oke testified that in response to his suggestion that Mr. Kean call the A.I.B. himself, Mr. Kean reiterated that unless the agreement was fully implemented the company left him no choice but to take the group back on strike.
  - (2) Miss Edna Kloepper testified that on December 2, 1976 Mr. Kean phoned J.W. Cummings, the vice-president of manufacturing, at 3:45 p.m. As he was not in at the time she took the following message on Mr. Kean's request: "If contract not fully implemented or effective and letter rescinded then all plants will be on strike next week (including Wallaceburg)." Miss Kloepper told the Board that she repeated the message to Mr. Kean to check its accuracy and that he confirmed the contents and stressed its urgency.
  - (3) Mr. Kean testified that during a telephone conversation with counsel for the applicant on December 3, 1976 he said that he was going to write for immediate strike authority and that the employees might be on strike the next week.
  - (4) Mr. Lewis Holly, the manager of personnel and industrial relations for Libby recounted a conversation with Mr. Carney on December 3 during which Mr. Holly was wondering whether there was any point in calling the office people back from layoff if there was truth to the rum-

ours of an imminent strike. He testified that Mr. Carney said that the threat of a strike existed, that he was waiting to hear from Mr. Kean that it might happen sooner than Mr. Holly might think.

5. On the basis of all the evidence the Board is satisfied that threats of a strike were made by Mr. Kean between December 2 and December 3. Whether such threats are prohibited under section 65 of the Act, however, depends on whether or not the threatened strike would be lawful or unlawful. Section 63(1) of the Act prohibits strikes during the term of a collective agreement. The threats made by Mr. Kean were threats of an imminent strike. Thus if a collective agreement was in operation between the parties in December, 1976 the strike threats made by Mr. Kean would be threats of an unlawful strike and thus prohibited by section 65 of the Act.

6. On November 19, 1976 the parties signed a memorandum of agreement. By an exchange of letters on November 22, 1976 the company notified locals 35 and 251 of its ratification of the settlement and the two locals notified the company of their ratification. Thus on November 22, 1976 collective agreements complying with the terms of section 1 (1)(e) of the Act began to operate between the company and locals 35 and 251, respectively.

7. If the Board did not have to consider the impact of the Anti-Inflation Board rollback this case would resolve itself with the finding that since the threats related to a strike which was to take place during the term of a collective agreement, sometime in December, 1976, such a strike would have been illegal, and thus the threats themselves were in violation of section 65 of the Act.

8. This matter cannot be judged in isolation, however, and the Board must consider the effect, if any, of the rollback of the agreement which took place in February, two months later.

9. It is an uncomfortable task to try to reconcile a federal act under which compensation packages freely negotiated in excess of the guidelines set by the Regulations under the Anti-Inflation Act may either be allowed or disallowed, with a provincial act under which a collective agreement containing a freely negotiated compensation package in excess of the guidelines is valid. All parties caught in the network of the interplay of these two statutes are stung to one degree or another by the experience. The uncertainty that befalls the parties to a collective agreement containing a compensation package in excess of the arithmetic guidelines as to whether or not the compensation package will ultimately be approved or disapproved coupled with the generality of the rollbacks that do result thus requiring the parties to renegotiate their agreement appear to be at the heart of the difficulty of meshing the two acts. On a number of occasions the Board has been faced with the task of determining the impact of the Anti-Inflation Act on the Labour Relations Act.

10. In *Mole Construction*, [1976] OLRB Rep. August 391 the Board heard several grievances under section 112a of the Act alleging that the employer was in violation of the collective agreement because it was not paying wages in accordance with the terms of the collective agreement but rather adhered to the arithmetic guidelines set by the Anti-Inflation Act Regulations. The case was heard prior to an A.I.B. decision as to the allowability of the compensation package and thus deals with the pre-rollback status of a collective agreement containing a compensation package in excess of the guidelines as judged in

the pre-rollback stage. The Board found that the possibility of a rollback or, put differently, the possibility that the agreement might later be found to be in excess of the allowable amounts, did not render the agreement or any part of it null and void. The dilemma for the Board arose with the recognition that an ultimate finding of illegality might subject the employer to fines for paying wages in excess of the allowed amounts even though such payments would have been made before anyone would have known what the allowable amounts were. Accordingly, while the Board held that the employer was in violation of the collective agreement for refusing to pay wages in accordance with its terms, in recognition of the possibility of the employer being subjected to fines if ordered to fully implement the valid collective agreement, it allowed the parties to fashion their own remedy, suggesting the possibility that the amounts in excess of the arithmetic guidelines be paid into a separate account pending the final resolution of the status of the agreement under the Anti-Inflation Act.

11. In *Silverwood Dairies* (Board File No. 1518-76-R, as yet unreported) the Board was concerned with the pre-rollback status of the collective agreement containing a compensation package in excess of the arithmetic guidelines as judged after the rollback but prior to a pending review by the Administrator. While the Board concluded that there was no collective agreement during the period of limbo its decision was based on the existence of a condition precedent in the memorandum of settlement which provided, in effect, that the settlement was subject to, or dependent on, A.I.B. approval. In *Mole Construction*, on the other hand, the parties were agreed that apart from the effect of the A.I.B. there was a valid collective agreement between them, i.e. that the existence of the collective agreement was not made conditional on A.I.B. approval.

12. In *Croven Limited* (Board File No. 1983-76-U, as yet unreported) and *Ferranti-Packard Limited* (Board File No. 2025-76-U, as yet unreported) the Board was faced with determining the status of a collective agreement containing a compensation package in excess of the arithmetic guidelines as judged after rather than before the A.I.B. disallowed all or any part of the excess. In *Ferranti-Packard Limited* the Board found that the rollback did not nullify the collective agreement because the parties specifically provided for a procedure to resolve differences that might arise in implementing the rollback. The collective agreement persisted in the face of the rollback because instead of destroying the consensual basis upon which the agreement was made, the rollback actually brought into operation one of the terms of the collective agreement.

13. In the *Croven* case, on the other hand, the collective agreement made no reference to the A.I.B. or to how the parties would determine the implementation of a rollback. In deciding that the rollback had the effect of rendering the collective agreement null and void, the Board recognized the bargaining fact that the imposition of a new ceiling on the compensation package might cause the parties to make very different trade-offs, both inside and outside the framework of the compensation package, from those made when the compensation ceiling was higher. The rollback imposed an overall restriction on the compensation package; it did not specify any severable portion within the package that was alone affected. In the Board's eye the rollback thus put into abeyance the full network of trade-offs that had previously been made in negotiating the collective agreement on an unrestricted basis. Accordingly, the Board found that the rollback struck at the very heart of the collective agreement rather than at any severable portion of it in that the consensual underpinning of the agreement as a whole was destroyed by the imposition of a lower compensation package.



ceiling. Upon concluding that the rollback displaced the consensual character of the collective agreement, the Board found that the agreement had lost the essential aspect of its identity as a collective agreement and thus became null and void. The Board concluded as well that the consensual foundation could only be restored through renewed negotiations with the parties placed on an equal footing which would, by necessity, include the ultimate availability of a strike or lockout.

14. While through the above sets of cases the Board has determined both the pre-rollback and post-rollback status of a collective agreement, it has not yet had occasion to address itself to a mixing of the pure situations, i.e. to determine the post-rollback status of a collective agreement in the pre-rollback stage, a step which must be taken to decide the instant case. This Board must, in other words, decide whether in light of the rollback in February, the collective agreement should be seen as having existed in December, the time at which the threats were made. By juxtaposing *Mole Construction* and *Croven* we note that the case at hand is similar to *Mole Construction* where the Board found that the collective agreement remained valid despite the possibility of an A.I.B. rollback in that this case concerns the status of a collective agreement in the pre-rollback stage; it is also similar to *Croven*, however, where the Board found that a rollback nullifies a collective agreement in that the determination in this case follows a rollback.

15. Counsel for the respondent union argued that the Board's decision in *de Havilland Aircraft of Canada Limited*, [1976] OLRB Rep. July 383 indicated that the Board was not treating *Mole* as determinative, a proposition which this Board finds devoid of merit. In *de Havilland Aircraft* the A.I.B. rolled back the agreement of the parties. In response to the the rollback the company made some unilateral changes which did not find favour with the union. It was in reaction to these manoeuvres that the union representatives made statements which the company characterized as threats of an illegal strike. The Board held that the words used did not constitute a threat and thus dismissed the application. Even if the Board were to have found that the words constituted threats and still dismissed the application on the grounds that the A.I.B. rollback had nullified the collective agreement, however, the decision would not contradict *Mole* because the past-rollback time period in question in *de Havilland* was not encompassed by the *Mole* decision which was concerned with the pre-rollback status of a collective agreement as judged in the pre-rollback stage.

16. While the applicant employer urged the Board to reconsider the *Croven* decision and while the respondent union requested the Board to reverse the *Mole* decision, we find no reason to depart from these decisions and affirm the principles in both *Mole* and *Croven*: until it is known whether or not the compensation package will be rolled back, i.e. during the period of limbo, a collective agreement made in excess of the arithmetic guidelines is a valid collective agreement. Once the A.I.B. renders its decision and rolls back a percentage of the compensation package, however, that collective agreement becomes null and void unless the implementation of the rollback is provided for in the collective agreement.

17. The agreement becomes void from the moment of the rollback forward. It does not become void *ab initio*. When it began life and indeed until it was struck down by the rollback it lived as a valid agreement under which the parties conducted their affairs. That the A.I.B. rollback has the sudden effect of voiding the agreement does not mean that the agreement must be deemed to have been non-existent from the start.

18. If the Board were to find that the A.I.B. rollback rendered the agreement void *ab initio* it would raise the possibility that rights decided in accordance with the collective agreement during the period of limbo would lose their foundation and become unenforceable. For example an arbitration decision reinstating an employee for wrongful dismissal might lose its enforceability if the basis upon which it was decided, the collective agreement, suddenly disappeared. As well, a displacement or termination application otherwise timely under the collective agreement might lose its timeliness if the collective agreement upon which its timeliness was judged comes to be viewed as never having existed. In this event the rights and obligations which had been put into place by the resolution of such an application would once again become uncertain. Furthermore, a strike or lockout during the period of limbo which might be found to be illegal if judged prior to the rollback could be viewed as legal if judged after the rollback.

19. Sound labour relations demands that as much predictability and reliability as possible accompany the transactions between the parties during the period in which the parties to a collective agreement are awaiting a decision from the A.I.B. It follows from the Board's finding that the collective agreement is void as of the moment of the rollback forward rather than void *ab initio* that, during the period of limbo, the parties should be able to predict their non-compensation rights and obligations with a reasonable degree of certainty. Subject to the overriding effect of the ultimate decision of the A.I.B., they will be able to rely on resolutions occurring during this period through, for example, the arbitration process.

20. It further follows from the Board's finding in this case that for the parties to be in a position to engage in a legal strike or lockout during the post-rollback negotiation they will have to comply anew with the terms of section 63(2) even if in reaching the condemned collective agreement the parties had already exhausted the conciliation process. Because the rollback renders the collective agreement void as of the moment of rollback forward and not void *ab initio*, the earlier agreement does not disappear: it remains as having existed and as having been brought to an end by a supervening event. Accordingly, the post-rollback negotiations relate to a collective agreement that will succeed the nullified collective agreement rather than fill a vacuum left by it. Under this view any conciliation processes that were engaged in to conclude the nullified agreement must be viewed as spent and cannot be applied to the new negotiations.

21. This post-rollback requirement that the parties engage in the conciliation process before a strike or lockout is consistent with the Board's decision in *Croven*. Although the issue was not argued before the Board in *Croven* and although the Board, therefore, made no explicit finding on the point, the requirement to proceed through the conciliation process prior to being placed in a legal strike or lockout position implicitly flows from the Board's decision in *Croven*. After finding that there was no collective agreement between the parties that would itself serve as a bar to a strike or lockout, the Board directed the parties to return to the bargaining table and negotiate a new collective agreement. It follows that the parties are expected to conform to the scheme of the Act as it relates to the bargaining of collective agreements. Although the parties in *Croven* had not engaged in post-rollback conciliation when the threats were made, the Board, having regard to the unique circumstances before it, was content to order the parties back to the table under specified guidelines and to dismiss the application.

22. Applying the principle that the rollback renders the agreement prospectively void to the facts of this case, the Board finds that the threats of an imminent strike made by Mr. Kean in December, 1976 were contrary to section 65 of the Act because the threatened strike would have taken place during the term of a collective agreement and thus been illegal. That the A.I.B. rollback invalidated the collective agreement does not displace the fact that when the threatened strike would have taken place the agreement was valid.

23. While the Board declares that the threats were contrary to the act it declines to exercise its discretion to issue a direction against further threats. Not only is there an absence of evidence of a history of such threats but also there is at this time no collective agreement between the parties.

#### **DECISION OF J.E.C. ROBINSON, Q.C.**

In the interests of expediency, and in order to allow the parties to consider the ramifications of the majority decision at once, I reserve the comments, if any, which I may have upon the majority decision, until a future time.

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**1761-76-U** P. Holmes, (Complainant), v. **Rowntree Mackintosh Canada Ltd.** and Retail, Wholesale, Bakery and Confectionery Workers Union, Local 461, (Respondents).

**Section 79 – duty of fair representation – effect of trade union promoting cause of senior employee – whether junior employee fairly represented – whether hiring hall provisions apply.**

**BEFORE:** Ian C.A. Springate, Vice-chairman and Board Members M.J. Fenwick and F.W. Murray.

**APPEARANCES:** *Stephen M. Grant and Pat Holmes for the complainant; R.A. Peacock and R.J. Konarzycki for the respondent employer; H. Buchanan and W. Haynes for the respondent trade union.*

**DECISION OF THE BOARD:** April 4, 1977

1. The name “AFL-CIO-CLC Loc 461” appearing in the style of respondent union is amended to read “Retail, Wholesale, Bakery and Confectionery Workers Union, Local 461.” The name “Rowntree/MacIntosh Ltd.” appearing in the style of cause of this complaint as the name of the respondent company is amended to read “Rowntree Mackintosh Canada Ltd.”

2. This is a complaint which alleges that the respondents have violated several sections of The Labour Relations Act. At the hearing counsel for the complainant limited the scope of the complaint to allege that the respondent trade union had violated both section 60 and section 60a of the Act.



3. The complainant is an employee of the respondent employer and as such comes within a bargaining unit covered by a collective agreement between the respondent employer and the respondent trade union. At the commencement of the events giving rise to this complaint the complainant had been employed by the respondent employer for less than four months, with all of their time having been spent in the respondent employer's 'After-Eight' Department. Mrs. Elley at the relevant time had been employed by the respondent employer for about twenty years.

4. On or about February 9, 1976 the respondent employer created the temporary position of "checkweigher" in its 'After-Eight' department. The complainant was selected to fill this position. At the time it was understood by all concerned that this position would be abolished in about three months' time. Towards the end of the three month period, however, the respondent employer decided that the position should be made a permanent one. Pursuant to the collective agreement the permanent position of checkweigher was posted so as to allow all employees an opportunity to apply for it. Six employees, including the complainant and Mrs. Elley, applied for the job although two employees subsequently withdrew their applications upon discovering that a certain degree of mathematical ability was required. The remaining four applicants were asked to write a test in order to demonstrate their mathematical abilities. On the basis of their scores on this test, the respondent employer came to the conclusion that of the applicants only the complainant and Mrs. Elley had demonstrated sufficient mathematical ability to perform the job. In terms of actual performance on the test, however, the complainant scored significantly higher than did Mrs. Elley.

5. Subsequent to this test, Mr. Barry Page and Mr. J. Ryan, the respondent employer's production manager and foreman of the after-eight department respectively, sought to assess the relative abilities of the complainant and Mrs. Elley. It was their decision, based on the information before them, that the complainant should be awarded the job, and as a result on or about May 19, 1976 the complainant was permanently assigned to the position of checkweigher. Mrs. Elley, however, refused to accept this decision, and as a result grieved that she should have been awarded the job. The relevant article of the collective agreement states as follows:

#### "JOB POSTING

41. (c) In the event two or more employees apply, the Company shall consider the skill, ability, efficiency and physical fitness of the applicants. As between two of equal standing, seniority shall "govern. The Management reserves the right to hire outside help, provided in their opinion the applicants are not capable of performing the work required."

6. The respondent employer rejected Mrs. Elley's grievance but indicated that it would be willing to give her a 60 day "probationary period" in which to demonstrate that she had the necessary skill and ability to do the job, and that it would then decide which of the two employees should be assigned to the position. This offer was accepted by the trade union. It appears that in advancing their offer the employer was of the view that its proposal was a reasonable compromise in the circumstances, and also that the union had agreed that Management's final assessment as to the relative abilities of the two employees would not subsequently be challenged.

7. On or about July 6, 1976 Mrs. Elley commenced her probationary period in the checkweigher position, with the complainant going back to her former, lower rated, job (although apparently during this period she was paid the higher checkweigher's wage rate.) The complainant refused to accept this state of affairs and filed a grievance of her own. While Mr. Duncan, the union's chief steward was clearly displeased with the fact that the complainant had filed the grievance, the grievance was processed by the respondent union, culminating in a meeting between Mr. Peacock on behalf of Management and Mr. Duncan and Mr. Bill Haynes, an international representative of the Retail, Wholesale and Department Store Union, on behalf of the respondent trade union. (The respondent union is a chartered local of the Retail, Wholesale and Department Store Union.) Subsequent to this meeting Mr. Duncan and Mr. Haynes advised the grievor that her grievance would not be carried any further in that she did not have grounds for a successful grievance. Further, it was suggested that before she took any further action the complainant should wait until the end of Mrs. Elley's probationary period. The complainant, however, declined to accept this advice and on August 14, 1976 appealed to the table officers of the respondent union concerning the decision not to carry her grievance any further. Subsequent to a meeting with the table officers the complainant was informed that the respondent trade union would still not proceed any further with her grievance in that in its view she would not have a good grievance until such time as the respondent employer had decided who would be finally assigned the job of checkweigher.

8. When Mrs. Elley's 60 day probationary period was drawing to a close, Mr. Page and Mrs. Ryan again assessed the relative abilities of Mrs. Elley and the complainant. Their conclusion this time was that both of these employees were now first class checkweighers, with nothing to favor one over the other. This being the case the respondent employer determined that pursuant to the collective agreement seniority should be the determining factor. Then, on the basis of her longer seniority in the after-eight department, the complainant was, on or about October 8, 1976, once again awarded the job of checkweigher, and Mrs. Elley was transferred back to the moulding department.

9. On or about October 13, 1976, Mrs. Elley once again filed a grievance which was actively supported by the respondent trade union. The union took the view that in this type of situation it was company-wide seniority which should apply and that in applying departmental seniority the employer was still not complying with the terms of the collective agreement. Subsequent to the filing of this grievance Mr. R. Peacock, the respondent employer's vice-president in charge of manufacturing, reviewed the company's personnel files. It was his testimony that upon doing so he discovered that both company-wide and departmental seniority had been employed by the company in this type of situation. Having regard to this fact, as well as to his stated concern that the company provide benefits to longer service employees, Mr. Peacock determined that company-wide seniority should be the determining factor. On this basis Mr. Peacock, on or about November 26, 1976, made the decision that the position of checkweigher should be given to Mrs. Elley, the senior employee possessing the necessary skill and ability.

10. This decision led to a second grievance being filed by the complainant. Mr. Raymond Gallant, who replaced Mr. Duncan as chief steward, testified that he met with Mr. John Worsley, who at the time was acting for an absent Mr. Peacock, to discuss the matter and that Mr. Worsley had turned down the grievance. Mr. Gallant stated that when he informed the complainant of Mr. Worsley's statement, the complainant indicated that she



was going to raise the matter with the Ministry of Labour. Having regard to this fact as well as to the fact that Mr. Haynes did not support the complainant's position, Mr. Gilbert stated that there was nothing more he could do. Mr. Gilbert also testified that he understood that on job postings seniority was to be applied on a company-wide basis and that therefore it was his view that Mrs. Elley had properly been assigned to the job.

11. The above facts set out the background to the complainant's contention that the respondent trade union violated section 60 of the Act. Section 60 stipulates that a trade union shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in a bargaining unit.

12. The essence of the complainant's case is that the respondent trade union decided that Mrs. Elley should get the position of checkweigher due to her greater seniority with the company, and that having reached their decision the union failed to concern itself with the grievor's rights under the collective agreement. This "not-caring" attitude towards the complainant's rights, counsel contended, especially when coupled with the union's support of Mrs. Elley only because of her greater seniority, constituted both arbitrary and bad faith conduct on the part of the respondent union.

13. Complainant's counsel may be correct in his contention that a union must have regard to the rights of the individual employees under a collective agreement rather than merely adopt a policy of always supporting the more senior employee in disputes relating to job vacancies. (See: the *Princesdomu* case, [1975] OLRB Rep. May 444.) However, we are of the view that it has not been demonstrated in this case that the respondent trade union's actions were motivated by such a general policy. Mr. Duncan in his testimony stated that the union's officials were of the view that Mrs. Elley was capable of doing the job "just as well" as the complainant, and that therefore she should be awarded the position on the basis of her twenty years of seniority with the company. He further indicated that the Union had been concerned that in its view the employer had assigned the position to the complainant in the first place largely due to the fact that she had already been doing the work on a temporary basis, even though Mrs. Elley had some years before performed a similar type of work in another department.

14. Since the complainant trade union had reached the conclusion that Mrs. Elley could probably perform the job of checkweigher just as well as the complainant, there was nothing inherently improper in its actively seeking to have the position filled by the employee with the greater seniority. In situations such as this, where two or more employees are competing against each other for a single job vacancy, a union is entitled to challenge those decisions of Management which it feels violates the terms of the collective agreement. However, provided the union does not act in a manner that is arbitrary, discriminatory or in bad faith it cannot be said that the union has an obligation to actively pursue the grievances of every dissatisfied employee in such a situation. Such a requirement would only serve to damage the credibility of the union in the eyes of the employer and seriously impair the union's ability to resolve differences arising out of the administration of the collective agreement, a development which in the long run would be to the detriment of the employees in the bargaining unit as a whole.

15. Counsel for the complainant also contended that the respondent union had committed a fundamental breach of the complainant's rights by agreeing to allow Mrs. Elley a



60 day probationary period as a checkweigher. We cannot agree with this assessment. The union was of the view that Mrs. Elley because of her ability to do the work involved and her greater seniority should have been selected to fill the position. However, rather than take Mrs. Elley's grievance forward to arbitration it agreed to a compromise whereby Mrs. Elley would be given an opportunity to demonstrate to the employer her ability to do the job. Such an arrangement was not inherently unreasonable, and indeed if a union is to be able to function effectively it must be able on a day to day basis to reach compromises with an employer, provided however that in reaching such compromises the union does not breach its duty of fair representation.

16. Counsel for the complainant was of the view that the respondent trade union violated its duty of fair representation by refusing to comply with the terms of Mrs. Elley's probationary period. In particular he contended that the union had agreed to accept management's decision as to which employee should be awarded the job at the end of the 60 days. It is difficult from the evidence to determine just what the union agreed to in this regard. However, it is clear that following Management's decision the union did not take issue with the employer's assessment of the relative abilities of the two employees although it did sharply disagree with the application of departmental rather than company-wide seniority once the employer had determined that both employees were equally capable of performing the job. We accept that in the view of the union this issue did not fall within the scope of its original agreement which was to allow the employer to have the final say as to the relative abilities of the two employees. Indeed in the view of the union its major concern from the very beginning of this matter was that an employee with twenty years' seniority and who could perform the work should be given the position. Thus we are of the view that the respondent trade union's successful attempt to convince the respondent employer that in fact it was company-wide seniority which should govern in a case such as this did not constitute conduct which was arbitrary, discriminatory or in bad faith.

17. Having regard to the foregoing we are of the view that the complainant has failed to show that the respondent trade union has violated section 60 of the Act. In reaching this conclusion, however, we expressly refrain from commenting on the correctness or otherwise of the union's interpretation of the collective agreement. Our finding is simply that the complainant has failed to show that the respondent trade union acted in a manner that was arbitrary, discriminatory or in bad faith in representing her.

18. We turn now to the complainant's allegation that the respondent trade union by its actions violated section 60a of the Act. Section 60a states as follows:

"Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith."

19. Counsel for the complainant contended that section 60a was applicable to the facts of this case in that the respondent trade union had under the terms of the collective agreement involved itself in the job selection process. We have some concern as to whether or not section 60a is applicable to situations such as that before us in that the section appears to be primarily addressed to the "hiring-hall" type of arrangement. (For a discussion of the law in such situations prior to the enactment of section 60a see the *Arthur Roberts*

case, [1974] OLRB Rep. March 169.) However, even if it is assumed that the respondent union in a situation such as we have here could violate section 60a, we are of the view, for the reasons set out above, that the union did not act in a manner that was arbitrary, discriminatory or in bad faith, and thus did not breach the section.

20. This complaint is dismissed.

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**1664-76-U** Shafickool Mohammed, (Complainant), v. Local 439, United Automobile Workers (United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W.), (Respondent). v. **Massey-Ferguson Industries Limited and Massey Ferguson Limited**, (Respondent).

**Section 70 – duty of fair representation – practice – procedure – effect of complaint on employer – whether employer must lead evidence concerning the merits of a grievance – whether the Board itself will adjudicate such grievances.**

**BEFORE:** A. L. Haladner, Vice-Chairman and Board Members J. E. C. Robinson, Q.C. and E. Boyer.

**APPEARANCES:** *Wallace Fram and S. Mohammed for the complainant; Larry Sheffe, Lloyd Jacques, J. Porter and R. Bowman for the respondent union; Tim Sargeant and Garry T. Neil for the respondent employer.*

**DECISION OF A. L. HALADNER, VICE-CHAIRMAN, AND BOARD MEMBER E. BOYER; April 29, 1977**

1. This is a complaint under section 79 of The Labour Relations Act wherein it was alleged that the respondent union had contravened the provisions of section 60 of the Act in failing to proceed to arbitration with respect to a grievance of the complainant against the respondent employer.

2. At the outset of the proceedings, counsel for the employer requested leave of the Board to reserve his right to adduce evidence on the merits of the complainant's grievance pending a determination by the Board that the union was in breach of its duty of fair representation. In light of the Board's dictum in *Nick Bachiu*, [1975] OLRB Rep. Dec. 919; [1976] 1 Canadian LRBR 431 – to the effect that the merits of a complainant's grievance and the merits of a section 60 complaint should not be separated as a matter of procedure – the Board called for argument on the motion, after which it adjourned to consider the matter. The parties were informed orally of the substance of the Board's decision on the employer's motion some time ago. Because that motion raised important issues of law and procedure in the Board's administration of section 60, we are now issuing these formal reasons for decision.

3. Before dealing directly with the issue raised by the employer's motion, we propose to outline, in some detail, the jurisprudential development of the Board's remedial au-

thority in the fair representation area, as well as the development of the procedural format which the Board has adopted for the adjudication of section 60 complaints. Conclusions reached about the scope of our remedial authority must, of necessity, be taken into account when deciding upon an appropriate procedure.

4. The duty of fair representation – that a trade union is prohibited from acting “in a manner that is arbitrary, discriminatory, or in bad faith in the representation of any of the employees in the bargaining unit” – has been a part of The Labour Relations Act since early 1971. But it was not until late 1973 that the Board recognized that an employer might be joined as a party to an unfair representation complaint (see *Gebbie and Longmoore*, [1973] OLRB Rep. Oct. 519). Initially, the Board took a narrow view of the scope of its remedial authority and dismissed unfair representation complaints insofar as they purported to relate to the employer (see, for example, *Percy Woods*, [1971] OLRB Rep. Nov. 730; *Denis H. O’Keefe*, [1972] Rep. April 298; *Brian F. O’Donnell*, [1972] OLRB Rep. May 423). The rationale for these decisions was that section 60 had direct reference to the union only and imposed no statutory duty upon the employer. While none of the cases specifically held that an employer could not be joined as a party for remedial purposes, there can be little doubt that the early section 60 jurisprudence did not envisage the Board’s remedial authority extending so far as to allow it to order a remedy which might affect an employer’s legal rights (see dissent in *Imperial Tobacco Products*, [1974] OLRB Rep. July 418; [1975] Canadian LRBR 1)

5. The first significant procedural statement by the Board in respect of section 60 is contained in *Rutherford’s Dairy Limited*, [1972] OLRB Rep. March 240. In that case, the Board suggested that the adjudication of an unfair representation complaint involved a two-stage procedure. It stated:

“In order to obtain relief, it must first be established that the union has violated section 60 in that it has acted in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees it represents. If it is determined that the union has violated the provisions of section 60, the next stage of the proceedings involves a determination of the amount of loss sustained by the person concerned. In other words, the fact that a union might have acted in bad faith does not establish that the complainant had a valid or meritorious claim. Once a finding has been made that a union has violated section 60, evidence must be adduced to establish that the person concerned has sustained loss as a result thereof. If the person concerned has a grievance against an employer which the union has failed to process through the grievance and arbitration procedures, the complainant must establish that the claim would likely have succeeded if fairly presented. There is therefore an onus on the complainant during the second stage of an inquiry of this nature to establish that an arbitration board would likely have given effect to his claim. In this respect, this Board would have to assess the claim in the same manner as an arbitration board...

However, if the complainant fails to establish that the union has violated the provisions of section 60, no inquiry need be made into the merits of the complainant’s claim against his employer. It is recognized



that in some cases the evidence concerning the merits of the claim and the evidence concerning the alleged violation of section 60 will be completely separate and severable. However, it is further recognized that the evidence concerning the two issues may be intermingled and inseparable so that all the evidence would have to be heard at one time."

6. There are two points to be made about *Rutherford's Dairy*. The first is that at the time of the decision, March 1972, an adjudication by the Board of the merits of the complainant's grievance was regarded as essential in those cases where the union's breach of its statutory duty was grounded in a failure to process a grievance through to arbitration. Board adjudication of the merits of the complainant's grievance was essential because there was no other way to rationally assess the damages flowing from the trade union's breach. As has already been pointed out, the Board, in the initial period following the enactment of section 60, did not conceive of itself as having the remedial authority to refer the grievance of a successful complainant to arbitration.

7. The second feature of *Rutherford's Dairy* which requires emphasis is that while the Board did articulate a two-stage procedure for the adjudication of unfair representation complaints, it was cognizant, even at that early juncture, that the evidence in respect of the merits of the section 60 could not always be wholly separated from the evidence respecting the merits of the grievance which eventually produced it. In this regard, it should be noted that the gravamen of the complaint in *Rutherford's Dairy* was that the trade union had acted unfairly in deciding that his grievance was out of time. There was no allegation that the union had made an arbitrary, discriminatory or bad faith assessment of the merits of the grievance itself. In fact, the Board decided the case on the assumption that at least part of the grievance had merit.

8. In *Alfred Compton*, [1972] OLRB Rep. Oct. 916, the other case of procedural import decided in the pre- *Gebbie and Longmore* period, the Board found that the conduct of the union, in disposing of the complainant's grievance, was arbitrary and therefore in contravention of section 60 of the Act. When the issue of damages arose, the union, relying on the Board's ruling in *Rutherford's Dairy*, took the position that the matter should be heard in two stages, the first to determine the issue of liability, and the second to determine the issue of damages. Because section 60 was a new section and the procedures thereunder had not then been firmly established, the Board acceded to the union's request and directed the Registrar to list the matter for a hearing to determine whether the complainant was entitled to compensation. However, it indicated that, in the future, the preference of the Board would be to hear all the evidence at one hearing and deal with both issues at the same time.

9. One can see then, in the early section 60 jurisprudence, a movement from a two-stage to a one-stage procedure for the adjudication of section 60 complaints. But the point to remember about this procedural development is that it occurred in a legal context in which the availability of a remedy for a successful complainant required a judgment from the Board on the merits of the complainant's grievance against the employer. There was no question then, as there is now, of the Board referring the complainant's grievance to arbitration. The only issue in the early section 60 cases was whether the Board's inquiry into the merits of the grievance was to await a finding that the union was in breach of its duty of fair representation.

10. As indicated earlier, *Gebbie and Longmoore* marks the point of departure from a restrictive to a more expansive view of the scope of the remedial authority available to the Board in the fair representation area. In *Gebbie*, the Board, for the first time, recognized the inadequacy in many instances of section violations of a purely monetary award, and the need in such cases for an order which would provide the complainant with appropriate relief for the trade union's breach. Although the Board's finding in *Gebbie* that the union was not in violation of section 60 made it unnecessary for it to reach any definitive conclusion about whether the remedial provisions of the Act were broad enough to allow it to order a remedy which might affect the employer's rights, a reading of the decision leaves the distinct impression that the Board was inclined to the view that an employer could be joined as a party in appropriate circumstances, notwithstanding that section 60 imposes no statutory duty upon it. The Board stated:

"We recognize that section 60 imposes no statutory duty on an employer, but, we also recognize as we indicated in our interim decision that section 79(4)(c) gives this Board broad remedial powers including the vacating of the provisions of a collective agreement. If the Board is to utilize the remedy of remitting matters to arbitration it will undoubtedly be faced with the criticism that an employer whose rights may be affected is not a party to the proceedings; this is particularly so should the Board require time limits in a collective agreement to yield which may be permissible under section 79(4)(c). In order to avoid a denial of natural justice in these circumstances an employer should be a party to the proceedings and the Board's Rules of Procedure, i.e., Rules 28 and 54, may be used to give an employer notice and the opportunity to appear in those proceedings where his rights may be affected.

The real issue is whether the enforcement provisions of the Act contained in section 79(4)(c) should be made to run against an employer in the absence of any statutory violation by that employer. We recognize that in many situations appropriate relief cannot be afforded to an employee unless the relief can run to an employer. Section 79(4)(c) if read literally suggests that there may be relief against both the union and the employer where there is a breach of section 60.

Counsel for Ford took the position that the reference to section 60 was inserted in section 79(4)(c) in order to enable the Board to grant a remedy against a union for breach of section 60, but it did not contemplate that a remedy would also be awarded against an employer. That is the issue that remains to be decided. We point out that in *Vaca v. Sipes*, (1967) 386 U.S. 171 the Court had the opportunity to discuss the relationship of an employer to the situation where the union had violated its statutory duty. In *Vaca v. Sipes* the Court stated at p. 18,302: 'Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; *in fact, the employer may be*



*(and probably should be) joined as a defendant in the fair representation suit,...'*

*(emphasis added)"*

11. Besides its apparent endorsement of the position adopted by the United States Supreme Court in *Vaca*, the *Gebbie* decision also contains this important observation on the appropriate procedure for the adjudication of section 60 complaints involving an allegation of unfair representation with respect to the union's disposition of a grievance:

"It is also apparent that where there is an allegation respecting the union's refusal to deal with a grievance that many of the facts and issues surrounding the grievance may be resolved in the course of arriving at a determination concerning the union's duty. In those cases it may be desirable that this Board decide the grievance issues as well as the section 60 claim, because the remission of that type of situation to arbitration would only result in a duplication of evidence, time and cost to the parties."

In other words, the Board in *Gebbie* was of the view that, even if the remedy of remitting the grievance of a successful complainant to arbitration was available, it might still be desirable in certain circumstances for the Board to decide the contractual claim itself. It is noteworthy, moreover, that, although the Board in *Gebbie* did not find the union in breach of its duty of fair representation, it did go on to consider the merits of the complainant's grievance and to conclude that the grievance was without merit. That was an alternative ground for dismissing the complaint.

12. In *Joseph Pap*, [1974] OLRB Rep. Jan. 60; [1974] 1 Canadian LRBR 74, the Board provided a concrete example of the type of remedial response anticipated in *Gebbie*. The Board in *Pap* found that the union had violated its duty of fair representation in denying the complainant access to a meeting at which the union membership voted against taking his discharge grievance to arbitration. However, it decided against remitting the matter to arbitration or reinstating the complainant, assuming it had the authority to do so, not only because of the cost and time involved, but also because there was little likelihood that an arbitration board would have reinstated him. In the result, the Board ordered that Mr. Pap be paid the sum of \$1.00 by way of nominal compensation. We shall have more to say later about this particular exercise of the Board's remedial authority. At this point, we would simply record that in *Pap*, the Board demonstrated a willingness to adjudicate the merits of a successful complainant's grievance, irrespective of its power to refer the grievance to arbitration.

13. In *Imperial Tobacco* (supra) the Board, following the admonition of the United States Supreme Court in the excerpt from *Vaca* quoted with apparent approval in *Gebbie*, held that an employer was a proper party in any unfair representation proceeding in which its rights might be affected. The Board justified its decision on a number of alternative grounds which need not be repeated here. It is sufficient for our purposes to state that the Board concluded that its remedial authority under section 79 of The Labour Relations Act, of a collective agreement, was broad enough to allow the Board to provide meaningful and effective relief for an aggrieved employee and thus to prevent an employer from hiding behind a trade union's wrongful failure to take a grievance to arbitration.



14. Although the Board's holding in *Imperial Tobacco* that the employer was a proper party in an unfair representation action has become a landmark in the field, the Board was not in that case required to fashion a remedy for a violation of section 60.

[In fact, the actual disposition in *Imperial Tobacco* was that the question of whether the union had breached its duty of fair representation was prematurely before the Board (in that the union had not refused the complainants' access to the grievance procedure and it was not obvious that the interests of the complainants could not be effectively represented at arbitration) and that in the circumstances, the Board would defer to arbitration while retaining jurisdiction to ensure that the arbitration procedure was fair and remedially adequate.]

The Board did, however, in the course of its reasoning, offer these general observations about the kind of remedy which it might direct in a case where a violation of section 60 had been made out:

"...where it is first established that the trade union is in breach of its duty of fair representation by, arbitrarily failing to take the grievance to arbitration the Board may assume jurisdiction to interpret a collective agreement in order to fashion meaningful relief for the employee. (See *Joseph Pap...*) As noted above, this will often necessitate joining the employer who has initiated the sequence of events giving rise to the breach of the union's duty of fair representation. But, it was noted in *Gebbie...* that part of the remedy may be the remission of the grievance to an arbitrator under the collective agreement which raises the dilemma faced by this Board – when should the Board defer to arbitration in a s.60 situation. In many situations, in finding that the trade union has violated s.60 in failing to take an employee's grievance to arbitration, facts will arise that suggest the trade union is unlikely to represent the employee fairly at the arbitration hearing and in such a situation the board may decide to hear the matter itself..."

Thus the Board in *Imperial Tobacco* adopted, by way of obiter, the position which it had demonstrated in *Pap* that it would adopt in certain circumstances in the event it decided it had jurisdiction to order a remedy against a union which could affect an employer's legal rights – that it might not always refer a successful complainant's grievance to arbitration, notwithstanding its legal authority to do so.

15. In *Bachiu*, the case which provided the procedural dictum noted at the outset, the Board found that the union did not violate its duty of fair representation to the complainant, so again, the question of remedy was not before it. However, in light of the employer's position and representations:

"The employer explained that it had not adduced evidence with respect to the merits of the grievance because it believed the complainant's request for relief to be premature. It was submitted that if an employer was obligated to adduce all its evidence on the merits of the grievance before a violation of s.60 had been established the Board would be making an unwarranted encroachment on the jurisdiction of an arbitra-

tion board. In other words, it was suggested that, as a matter of policy, the Board ought not to arbitrate the grievances that come before it under s.60, or, *at the very least*, the Board should not consider the merits of a grievance until after a violation of s.60 has been established.”  
(the italics are ours)

the Board offered these comments on the appropriate procedural format for the resolution of section 60 complaints:

“We do not believe that the merits of the grievance and the merits of a s.60 complaint can be, or should be separated as a matter of procedure. The Board has to know all the circumstances surrounding a grievance to assess whether the trade union has dealt with it in a proper manner. The employer’s version will usually be very helpful in making this determination. However, in those cases where the Board finds that a violation of s.60 has been made out, a judgment on the merits of a complainant’s grievance will not follow automatically. The Board may adjudicate a grievance where the outcome of grievance arbitration is beyond doubt (*Joseph Pap...*) or it may do this where there is a concern that grievance arbitration will not provide an effective remedy (as explained in *Imperial Tobacco*). For example, this latter possibility may arise if the violation of s.60 is based on either the bad faith or discrimination of a trade union. But in other cases, where the outcome of arbitration is problematic and the Board is assured that the trade union will represent the complainant fairly, the more appropriate remedy, in light of the policy underlying s.37 of the legislation, may be to refer the matter to arbitration under the agreement and not for the Board to give its opinion on the merits (although it may retain jurisdiction). Of course this will depend on the peculiar nature of each matter that comes before the Board. (In fact, a successful complainant may not be entitled to a judgment on the merits – see dissent in *Pedalino and United Steelworkers of America*, [1975] OLRB Rep. Nov. 874.) However, this is not to deny that, with experience, the Board may come to the conclusion that, for reasons of economy and expedition it should finally dispose of all established violations. In our opinion the Board and the parties should be prepared to experiment with remedies and no clear rule needs to be articulated – at least we see no need for remedial certainty at this time.”

16. It is against this jurisprudential background that counsel for the employer in the instant case made his motion to reserve his right to adduce evidence on the merits of the complainant’s grievance until such time as the Board found a violation of section 60. It will no doubt be observed that the employer’s position here is almost identical to the “at the very least” position advanced by the employer in *Bachiu* – the only difference being that counsel there did not make the position of his client express until the completion of the evidence. Although the Board’s dictum in the *Bachiu* case does suggest that an employer who chooses not to adduce evidence with respect to the merits of the complainant’s grievance does so at its peril and that an employer cannot reserve its rights in the manner requested here, the Board’s experience since *Bachiu* has caused us to re-examine the whole question of

the procedure which should be adopted for the adjudication of section 60 complaints. As a prelude to our re-examination of this question, we should explain the use which the Board makes of evidence concerning the merits of the grievances which come before it under section 60.

17. There are two contrasting misconceptions about this matter. The first is that section 60 provides the complainant with a legal vehicle for obtaining arbitration of a grievance which his union refuses to press. The Board has consistently held that an individual employee has no absolute right to have his grievance arbitrated, (for a recent elaboration of the policy behind this principle, see *Antonio Melillo*, [1976] OLRB Rep. Oct. 613; [1977] 1 Canadian LRBR 182) and that the Board, in determining whether section 60 has been violated, does not assume the posture of an arbitration board and adjudicate the merits of the grievance (see paragraph 18). Even so, the misconception does persist, at least in the minds of some complainants, that a breach of the duty of fair representation is established merely upon proof that the underlying grievance is meritorious.

18. The second misconception, and one that even experienced union and employer counsel have appeared on occasion to embrace, is that the Board need not concern itself at all with the merits of the complainant's grievance until after a violation of section 60 has been established. While it is true that the question of whether there has been a violation of section 60 in a case involving a union refusal to process a grievance turns ultimately upon the Board's assessment of the merits of the grievance, the union's perception of those merits and the reasonableness of that perception are very often key indicators of the quality of the union's representation (see *Gebbie* for discussion of the standard which the Board applies in reviewing the decision-making process of the union). As we explained in *Melillo*, the Board, in a section 60, does consider the merits of the grievance, or rather the *prima facie* merits of the grievance, in order to arrive at an informed judgment about whether the union has represented the complainant in a fair manner:

"On the one hand, the fact that a grievance appears meritorious may lend credence to an employee's claim that he has been unfairly represented. For example, it may permit the Board to draw an inference of bad faith and/or discrimination in situations where the circumstantial evidence in respect of the union's motivation might otherwise prove inconclusive. On the other hand, the fact that a grievance does not appear to have merit will generally be supportive of the trade union's defence to an unfair representation complaint. (For a recent application of this principle, see the *Jay Sussman* case [1976] OLRB Rep. July 349). That is not to say, however, that the Board will never find a breach in circumstances where the complainant's grievance appears to lack merit (in this regard, see the *Joseph Pap* case...). Nor is it to say that a meritorious grievance will necessarily be dispositive of the union's defence. The merits of the complainant's grievance is but one of a number of factors (albeit an important one) of which the Board may take account in arriving at a judgment about whether the union has dealt with his grievance in a proper manner. Among the other factors which the Board may consider are: the importance of the particular grievance to the employee concerned, the implications of a settlement or arbitration on the other members of the bargaining unit both now and in the fu-



ture, whether there is any independent evidence of bad faith or discrimination, the degree of consideration given the grievance by the union, and the experience and qualifications of the trade union officials who have been involved in the processing of the grievance.”

19. The conclusion to be drawn from these preliminary remarks about the Board’s use of evidence in an unfair representation action is the conclusion which the Board expressed first in *Rutherford’s Dairy* and later in *Bachiu* – namely, that the evidence in respect of the merits of the section 60 and the evidence in respect of the merits of the grievance which underlies it cannot always be separated into mutually exclusive procedural containers. That does not, however, necessarily entail the further conclusion, suggested by way of obiter in *Bachiu*, that the Board should, where it is first established that the union is in violation of section 60, ever proceed to pass judgment on the merits of the complainant’s grievance without allowing the employer, whose rights are at that point in immediate peril, a fresh opportunity to adduce evidence. The *Bachiu* dictum did not stand for the proposition that the Board would *always* adjudicate the merits of a successful section 60 and the merits of the underlying grievance in one fell jurisprudential swoop. However, the uncertainty about whether the Board would do this in a particular case, or whether it would decide instead to refer the grievance to arbitration resulted in a noticeable tendency toward protracted section 60 proceedings. The problem was that some counsel (complainant, trade union and employer alike), felt compelled to put in all their evidence on the merits of the complainant’s grievance so as not to risk an unfavourable disposition on the grievance based on “insufficient evidence”. Although much of the evidence which the Board received in respect of the merits of the grievances which came before it under section 60 had, for the reasons outlined in paragraph 18, a very real bearing on the question of whether the trade unions involved were in violation of section 60, some of it was completely without relevance to that issue and would probably not have been introduced but for the possibility of preemptive and automatic grievance arbitration by the Board.

20. Not only did the *Bachiu* dictum result in protracted section 60 proceedings, it was also regarded in some quarters, and we think with some justification, as unfair to the employer who is, after all, only a party to a section 60 complaint because its rights might be affected thereby. Lest there be any misunderstanding on this point, we want to make it clear that the Board holds to the position that an employer should not be permitted to shelter behind a trade union’s breach of its duty of fair representation, and thereby escape from its contractual obligation made mandatory by section 37 of The Labour Relations Act to answer in arbitration for “its alleged violations of the collective agreement”. Accordingly, the Board will continue to use its powers under section 79 of the Act, which include the power to override the specific provisions of a collective agreement, to ensure that an aggrieved complainant is not in that way deprived of the opportunity to obtain full and effective redress for a trade union’s wrongful failure to carry his grievance to arbitration (for the Board’s initial exercise of this remedial authority, see *Leonard Murphy and International Printing and Graphic communications Union, Local 482*, Board File No. 1687-76-U discussed *infra*). But that notwithstanding, we do not think it entirely fair to require an employer to defend itself against an alleged contract violation before a contravention of section 60 has been established.

21. With this analysis of the problems inherent in the procedural format suggested in *Bachiu*, we can now outline the procedure which the Board intends to adopt when dealing with section 60 complaints.

22. Where the Board determines that a trade union has violated its statutory duty of fair representation by failing to take an employee's grievance to arbitration, and where it further determines that arbitration is the appropriate remedy in the circumstances, (which it will not always be, see paragraph 28), the Board will exercise its remedial authority under section 79 of the Act to make an order directing the union to arbitrate the grievance with whatever modifications of the collective agreement appear necessary to ensure that a fair and expeditious arbitration on the merits of the grievance takes place. If the union's denial of fair representation has aggravated the complainant's financial loss, the Board will also, at that time, make an order for damages, apportioning liability as between the trade union and the employer in the event that the grievance succeeds at arbitration, together with whatever further orders that contingent order for damages may necessitate.

23. This procedure has already been used in another recent section 60 case. In *Leonard Murphy* (supra), the Board found that the arbitrary and bad faith conduct of the union had denied the complainants a chance to have their discharge grievances arbitrated. To rectify the loss occasioned by the union's breach of its duty of fair representation, the Board directed the union to arbitrate the grievances forthwith, notwithstanding certain potential collective agreement obstacles. Further, the union was required to compensate the complainants for their damages directly attributable to the union's unfair representation. Because of the inherent conflict of interest resulting from the Board's contingent order for damages, the union was also ordered to engage counsel, jointly chosen by the complainants and the union, to present the complainants' grievances at arbitration.

24. The implication of the procedure which the Board utilized in *Murphy*, and which the Board is now adopting, is that a party to an unfair representation proceeding (be it complainant, trade union or employer), need no longer feel compelled to present to the Board all its evidence on the merits of the complainant's grievance against the employer. The reason is that it will have a full opportunity to introduce that evidence before an arbitration board if the union is found to have committed a breach of its statutory duty and arbitration is indicated. We realize, of course, that many section 60 complainants appear before the Board without benefit of legal representation and that they will be no more familiar with this new procedural format than they were with the old. So as not to deny a complainant a full and fair opportunity to make its case, the Board has not been in the past, and will not be in the future, unduly restrictive with respect to the evidence which it allows to be introduced in a section 60 proceeding. The adoption of the new procedure, however, will mean that neither the union nor the employer will be required to respond to evidence which is of no relevance to the issue of whether the union is in breach of its duty of fair representation.

25. To summarize, the procedure which we have adopted for the adjudication of section 60 complaints is designed to avoid the twin pitfalls inherent in the procedure suggested in *Bachiu* – unduly protracted hearings and need for the employer to come forward with evidence to defend its actions in respect of the alleged contract violation before a violation of section 60 has been made out.

26. It should be emphasized that the procedure outlined in this decision does not mean that the parties to an unfair representation proceeding will now have no need of adducing evidence on the merits of the grievance underlying the complaint. The parties (particularly the complainant and the union) will still have an interest in conveying to the Board, through their evidence, a sense of how the complainant's grievance against the em-



ployer was likely to have been perceived by the trade union. There is in many section 60 cases, however, a great deal of evidence which, while very pertinent to the question of whether the complainant's grievance would be successful at arbitration, is not relevant to the issue of whether the union has dealt with that grievance in a proper manner.

27. Before concluding, we would add these further comments about the significance of the procedure which we have adopted within the framework of the Board's developing section 60 jurisprudence. Before *Gebbie*, the remedy of referring the grievance of a successful complainant to arbitration was not regarded as available, the Board taking the view that an employer was not a proper party to a fair representation complaint, since section 60 imposed no duty upon it. In order to assess the complainant's damages, the Board, therefore, was required to make a judgment about whether the complainant would have secured a favourable arbitration award. *Imperial Tobacco* then held that an employer, although under no statutory duty to the complainant, could be joined as a party for remedial purposes; and, from that point on, it was no longer necessary for the Board to speculate on the outcome of arbitration. Nevertheless, the option of final adjudication by the Board was preserved: first, because there was a concern that a trade union which had violated its duty of fair representation by failing to take an employee's grievance to arbitration might not do a sincere job of presenting that employee's case at an arbitration hearing; second, because the Board was concerned about referring unmeritorious grievances to arbitration with the expense, delay and duplication of evidence which that would entail; and, finally, because the remedy of the Board finally disposing of an established section 60 violation had always existed in theory, if not in practice, and the Board saw no immediate need to abandon that remedy simply because it was no longer restricted to an award of damages against the offending trade union.

28. With hindsight, the Board can now see that the uncertainty which was created by the preservation of that remedial option, with its unforeseen procedural ramifications, was neither necessary nor desirable. Should there be a concern now that a successful complainant will not be represented fairly by his union at arbitration, that concern can be met by the Board making an order directing the union to retain counsel acceptable to the complainant, as was done in *Murphy*.

29. It is true that the abandonment of the remedy of final adjudication by the Board of the grievances which come before it under section 60 may serve to delay and increase the costs to the parties in cases where a section 60 complaint succeeds. But that sacrifice is something which we believe, on balance, to be unavoidable. It should be emphasized, though, that not every successful section 60 complaint requires the remedy of arbitration. As we stated in *Murphy*, the whole point of a remedy for a violation of section 60 is to, as nearly as possible, put the parties into the position they would have been in had the unfair representation not occurred. Stated another way, the Board does not view section 60 as conferring upon a successful complainant an automatic right to have his grievance arbitrated. If the grievance is not one which his union would have been required to carry further had it not breached its duty of fair representation, the union should not be required to proceed to arbitration if it decides, after proper consideration, that it still does not wish to do so. This last conclusion suggests that the Board need not be concerned about abandoning the type of remedy which was ordered in *Pap*. It will be remembered that the Board there decided against referring the grievance of a successful complainant to arbitration, assuming it had authority to do so, not only because of the cost and time involved, but also because of the lack of merit in the grievance itself. That exercise of the Board's remedial authority, while



perhaps supportable within its historical context – at a time when the Board was still uncertain as to its authority to require a union to arbitrate a grievance – would not, in our view, be an appropriate one today, regardless of its procedural implications. Not only would a *Pap*-type remedy be of small consolation to a “successful complainant”, it would also be inconsistent with the Board’s concept of the purpose of a section 60 remedial order – that of restoring the *status quo ante*. The more appropriate response in a case where a union fails to take a grievance to arbitration, and it is not obvious that arbitration is necessary, is for the Board to direct the union to re-process the grievance from the point at which fair representation was denied. That is the kind of remedial response which the Board would have ordered in *Pedalino* (supra) had the views of the Vice-Chairman in that case been in the majority. It is, moreover, a remedial response which affords the parties an opportunity to voluntarily settle the grievance on terms which are not unfair to the complainant.

30. In conclusion, we should state that, while we have placed stress on the fact that the procedural pronouncements which have been, in part, modified by this decision were all offered by way of dicta, the Board will not remain wedded to procedural, or even substantive, ratio which appear, in the light of experience, to be impractical or unfair. This is especially true where, as here, the conclusions which have been altered cannot be said to have been relied on by the parties at the time of the conduct which gave rise to the complaint.

#### **DECISION OF BOARD MEMBER, J. E. C. ROBINSON, Q.C.:**

1. While I am in general agreement with the majority as to the procedure to be adopted in future with respect to applications brought under section 60 of The Labour Relations Act, I must disassociate myself from much of the reasoning contained in such decision.

2. It was my opinion much earlier, and it is today, that the language in section 60 of the Act is not such as would allow the employer to be joined in an application made under such section.

3. My reasoning therefor is fully set out in my dissent in *Imperial Tobacco Products*, [1974] OLRB Rep. July 418.

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**1791-76-M** Local 800 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant), v. **Spiers Brothers Limited**, (Respondent).

**Arbitration – Section 112a – whether section 112a reference is arbitrable when private arbitration board already constituted.**

**BEFORE:** M. G. Picher, Vice-Chairman and Board Members J. D. Bell and E. Boyer.

**APPEARANCES:** *H. Goldblatt, L. G. Lalande and R. Schoffield for the applicant; S. C. Bernardo, Blair Spiers and Reg Roberts for the respondent.*

**DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL:**

1. This is a reference to arbitration filed under section 112a of The Labour Relations Act.
2. The respondent has raised a preliminary objection to the hearing of the reference. The facts giving rise to the objection are not in dispute. The issue raised is whether the applicant, having commenced to pursue its remedy within the arbitration provisions of the collective agreement, may now avail itself of a section 112a reference.
3. The grievance in question was first filed with the respondent by the applicant on August 9, 1976. Having received no reply to its written grievance, by a letter dated September 14, 1976 the applicant served notice on the respondent that it intended to proceed to private arbitration, being the second and final stage of the grievance procedure within the collective agreement. It advised the respondent that M. L. Popovich was its nominee to the arbitration board. On September 21, 1976, the respondent gave the union notice of the appointment of its nominee. Subsequently, the two nominees agreed to the appointment of Professor R. D. Abbott of the Department of Law, Carleton University as Chairman of the board of arbitration. By agreement of the parties, nominees and chairman, the arbitration was scheduled for January 10, 1977 at Sudbury and copies of the written grievance were provided to the members of the Board.
4. On the appointed day the parties, nominees and witnesses gathered at the time and place designated for the hearing. Because of the snowstorm, however, Professor Abbott was unable to travel to Sudbury from Ottawa. He called the assembled parties and indicated some four alternate dates in January during which he could be available for a postponed hearing. It is common ground that one or more of the dates were acceptable to both parties and their nominees. At this point, however, the applicant union decided to abandon the private arbitration route and filed the instant reference to arbitration before this Board under section 112a of the Act.
5. The respondent argues that in these circumstances this Board ought not to hear the grievance. Counsel for the respondent argues that to allow the instant application to proceed would be unfair to the respondent which has relied on the election of private arbitration by the applicant and has incurred the expense of time, money and preparation in pursuance of that reliance. Counsel for the applicant replies that there can be no prejudice to the respondent since its preparation for the hearing of the grievance by this Board and by the private board of arbitration would be the same. He stresses that whether the postponed hearing is before us or before the private panel, the respondent's financial cost due to the postponed hearing of January 10, 1977 will be the same.
6. The issue raised involves the application of section 112a of the Act which provides, in part, as follows:
  - 112a(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 37, either party to a collective agreement between an employer or employers' organization and a trade union or council of trade

unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection 1 may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavor to effect a settlement before the hearing.

(3) Upon a referral under subsection 1, the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and the provisions of subsection 5a, 7, 8, 9, 10 and 11 of section 37 apply *mutatis mutandis* to the Board and to the enforcement of the decision of the Board.

7. Section 112a was enacted to provide parties in the construction industry speedy access to the resolution of their grievances by arbitration. This procedural reform was made necessary because delays in the normal course of private arbitration had reduced the value of private arbitration to something close to the vanishing point in the construction sector. In the construction industry where workers are transient, projects are short-term and employment relations are prone to be short lived a late arbitration remedy is often as good as no remedy. As a result aggrieved employees and unions were prone to resort to work stoppages and the wildcat strike to resolve disputes that would normally have been the subject of arbitration. This is the mischief that gave rise to the enactment of section 112a of the Act. (For a more complete account of the background to section 112a, see *The Lummus Company Canada Limited*, and *The Ontario Erectors' Association* [1976] OLRB Jan 980 at 983).

8. In the instant case the parties have constituted a board of arbitration to dispose of the grievance. At the time of the postponement of its proceedings that board remained accessible to the parties within the same time as this Board would be under section 112a of the Act. Counsel for the respondent has argued that in this circumstance the grievance ought not to be seen as arbitrable by this Board. We agree.

9. Section 112a of the Act is framed so as to confer on this Board all of the powers that would be exercised by a board of arbitration constituted under section 37 of the Act, including the issue of the arbitrability of a grievance. In the instant case, we are of the view that this matter is properly before the board of arbitration constituted by the parties and is therefore not arbitrable by this Board.

10. This application is therefore dismissed.

#### **DECISION OF BOARD MEMBER E. BOYER:**

1. I dissent. In my view the majority has erred in its construction of section 112a of The Labour Relations Act, and as a result, has failed to exercise the exclusive jurisdiction to hear and determine the matter before us.



2. The parties herein are also parties to a collective agreement. In August of 1976 a dispute arose between them concerning the proper interpretation of their agreement, and the trade union filed a written grievance alleging certain violations. This grievance was apparently processed in accordance with the grievance procedure in the collective agreement, and eventually a board of arbitration was constituted pursuant to the arbitration provisions of that agreement. A hearing was scheduled for January 10th, 1977 at Sudbury – that is, some 5 months after the grievance was first filed. Through no fault of the parties the board established pursuant to the arbitration provisions of the collective agreement was unable to hold the hearing or begin its consideration of the matters in dispute.

3. While the law is not entirely clear, it would seem that an arbitrator does not begin his quasi judicial function until such time as the hearing is actually held and he begins to entertain the evidence and/or submissions of the parties. In *Re Taylor and C.N.R.* (1913) 9 D.L.R. 695 (C.A.) the Manitoba Court of Appeal was called upon to determine at what point an arbitration could be said to be “pending”. That Court determined that an arbitration was not “pending” until its judicial (as opposed to administrative) functions had actually commenced. As Perdue J. A. remarked (at p. 700):

“An arbitrator is not appointed until he has been both named in the order and has accepted office as such; and he enters on the reference, not when he accepts the office, or takes on himself the functions of arbitration by giving notice of his intention to proceed, but when he enters into the actual matter of the reference”.

4. The Manitoba Court applied the old case of *Baker v Stephens* L.R. 2 Q.B. 523 where the English Court of Appeal had distinguished between the administrative functions of “accepting the office” of arbitrator and “exercising the functions of” arbitrator. In any event, it is evident to me (and this was not seriously disputed) that the “private board” constituted pursuant to the terms of the collective agreement has not entertained the evidence or the submissions of the parties, nor has it begun its enquiry into the difference between them nor has it sought to exercise any of the powers which are accorded to it under The Labour Relations Act. That Board has been constituted pursuant to the arbitration provisions of the collective agreement, and may have received a copy of the written grievance, but nothing more has yet occurred.

5. Unlike the “private” board of arbitration which is constituted pursuant to the collective agreement (albeit because the parties are required to include such term in their agreement) the jurisdiction of The Labour Relations Board has *pre-eminent* rather than simply *concurrent* jurisdiction.

6. Section 112a of the Act provides as follows (in part):

112a (1) *Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 37, either party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.*

(2) *A referral under subsection 1 may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavor to effect a settlement before the hearing.*

(3) *Upon a referral under subsection 1, the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and the provisions of subsections 5a, 7, 8, 9, 10, and 11 of section 37 apply mutatis mutandis to the Board and to the enforcement of the decision of the Board.*

(my emphasis)

This section is clear and unambiguous. It plainly provides that “notwithstanding the grievance and arbitration provisions in a collective agreement...either party...may...*at any time* ... refer a grievance to the Board for a final and binding determination”. Once referred “the Board shall appoint a day for, and holding a hearing ... and has *exclusive* jurisdiction to hear and determine the differences”. In this case the applicant union has properly referred a matter to us. Nevertheless this Board has refused to “determine the differences” between the parties. The majority of this Board has said that because the union, pursuant to the arbitration provisions of the collective agreement has participated in the selection of a “private” board of arbitration, it cannot refer the matter to this Board.

7. I do not see how the majority can reach this result. The decision ignores the clear language of the statute which explicitly provides that a reference may be made, *at any time notwithstanding the arbitration provisions in a collective agreement*. In any event, there is no doubt (and the majority has conceded) that there *is* a reference before us under section 112a. In such circumstances, our jurisdiction to determine the dispute is *exclusive*. We are under a statutory obligation to hear and determine the matters in dispute. We cannot avoid this responsibility because of the existence of an alternative forum under the provisions of the parties’ collective agreement. Once the reference is made to us the “private” process is no longer available.

8. In this case there is no doubt that there is a dispute between the parties concerning the interpretation of their agreement. It has not been submitted that there is no collective agreement, or that the conditions precedent to our jurisdiction have not been fulfilled, or that the panel is disqualified by bias, or indeed any other reason why the matter is not “arbitrable” – save that the arbitration provisions of the agreement provide for an alternative forum and that we should therefore “defer” to that forum. In other words, the sole submission to us is that we should disregard the statute giving us *exclusive* jurisdiction, or in the alternative that our jurisdiction is not *exclusive* because of the conduct of the parties pursuant to the arbitration provisions of their collective agreement. In my respectful submission, *exclusive* means *exclusive*. There may be a number of reasons why a matter is not arbitrable, but the existence of a negotiated alternative is not one of them. This Board has already held that the parties are *not* required to exhaust the grievance provisions in their agreement before resorting to this Board (See *Lummu of Canada Ltd* [1976] OLRB Rep. (Jan) 980). The language of section 112a could not be clearer on this point.



9. The union originally filed its grievance in August of 1976. The matter was originally scheduled to be heard on January 10th, 1977. Following the abortive hearing on January 10th, the union had two alternatives:

- (1) it could seek agreement on alternative dates which would be acceptable to the Board Chairman, the nominee, the parties, the witnesses and counsel; or
- (2) it could refer the matter to The Labour Relations Board and be assured of a hearing on the merits within fourteen days.

It may well be, that the parties might have reached an agreement which would have permitted a hearing to be held at least as expeditiously as the proceeding before this Board. The evidence indicates that the union chose to pursue the second, surer alternative, and refer the matter to this Board – a course of action which in my view it was perfectly entitled to take. By referring the matter to this Board, the union was assured of an expeditious resolution of the dispute (or so it thought). It would also have access to the services of a labour relations officer who could meet with the parties and perhaps effect an amicable settlement. No such dispute settlement technique is available under the agreement.

10. The union chose to refer the matter to us, and I fail to see how the respondent employer is in any way prejudiced by that decision. Indeed it is probable that the overall cost of the arbitration proceeding has been substantially reduced. By virtue of section 112a, this Board has been substituted for the “private” board which was originally scheduled to hear the matter. It is not suggested that this Board is any less qualified than the board chaired by Professor Abbott; and even if it were, that argument is irrelevant in light of the language of section 112a. The union and company have prepared for an arbitration proceeding, and that is what this Board will provide. There is no prejudice in the substitution of this panel, particularly where the “private” board has not even begun its enquiry into the matters in dispute.

11. I concur with the majority view regarding the intention of the legislature in enacting section 112a. Access to this Board allows for the resolution of collective agreement disputes in the construction industry in a manner which is faster and cheaper than the ‘private’ process formerly available. Moreover the intervention of a labour relations officer has in fact resulted in the settlement of a considerable number of disputes without reference to a hearing at all. In view of the legislative concern for expedition, it is surely ironic that this Board has reached a conclusion which will result in further, substantial delays. Had we taken jurisdiction – as I believe we were required to do – the entire matter might well have been disposed of by now. As a result of the majority’s decision, the parties are now faced with the task of seeking agreement on new date(s) for the hearing which will be convenient for: the Chairman, the nominees, the witnesses, and counsel. Surely this is an absurd result – particularly in light of the explicit language of section 112a and the intention of the legislature.

12. The majority opinion amounts simply to this: “the trade union might have chosen to bring the matter before this Board if it had acted earlier, but following the constitution of the “private” board and the fixing of a hearing date it was ‘too late’ and the union has waived its right to come before this Board”. Apart altogether from the difficult issue of



whether a party *can* waive these statutory rights, there is simply no evidence of prejudice which would persuade me to apply such a doctrine. This Board is rightly concerned that orderly collective bargaining might be impeded if parties were allowed to “change horses at the eleventh hour”. This argument would have considerable force if a party were seeking to bring a proceeding before this Board after a “private board” had begun its consideration of the matters in dispute. That is not this case, but even if it were, it is the obligation of this Board to exercise its responsibilities under the statute. If that statute is defective, it is up to the Legislature to amend it; it cannot simply be ignored.

13. The common law courts are not unfamiliar with the problem before us. It is not unusual for a party to commence arbitration or stay the arbitration proceedings and subsequently seek to have the same matter litigated in the courts. In such circumstances the courts have a discretion (inherent in their power to control their own proceedings) either to defer to arbitration or stay the arbitration proceedings and allow the matter to proceed before the court. This discretion is not available to this Board which by virtue of section 112a has *exclusive* jurisdiction to hear and determine the dispute. While I am conscious of the practical problems which might arise in other situations, I am nevertheless convinced of the proper disposition of this case. I would hear and determine the grievance on the merits and would not defer to the “private” forum provided by the arbitration provisions of the parties’ collective agreement.

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**No. 1811-76-M Stanley Steel Company Limited, (Employer), v United Steelworkers of America, Local 4444, (Trade Union).**

**Conciliation – reference – whether Minister has authority to appoint new chairmen when original chairman disqualified for bias and second chairman unable to act.**

**BEFORE:** A. L. Haladner, Vice-Chairman, and Board Members O. Hodges and J. E. C. Robinson, Q.C.

**APPEARANCES:** *E. L. Stringer, Q.C. and J. Mathews for the employer; Walter Fox for the trade union.*

**DECISION OF THE BOARD:** March 31, 1977

1. The Ministry of Labour has referred to the Ontario Labour Relations Board, pursuant to section 96(1) of the Act, a question as to whether the Minister has authority under Section 37(4) of The Labour Relations Act to appoint a person to constitute a board of arbitration under a collective agreement.

2. This matter has had a long and tortured history. On May 6, 1972, Michael Kurk, an employee of Stanley Steel Company Limited (the “company”), was discharged from his employment. Mr. Kurk filed a grievance pursuant to the provisions of the collective agreement then in force between the company and United Steelworkers of America, Local 4444 (the “union”) protesting his dismissal and, in due course, a board of arbitration was consti-

tuted comprised of R. W. Reville, Chairman, E. J. McKillop, Q.C., company nominee, and Gary Perly, union nominee. The Board of Arbitration held hearings on a number of days. In the course of those hearings, the union moved before the Divisional Court of Ontario to have the Chairman removed for bias. By Order of the Divisional Court released October 11, 1974, Mr. Reville was prohibited from continuing to act as Chairman of the Board of Arbitration.

3. Subsequent to the issuance of the Divisional Court's order, the union nominee, Mr. Perly, requested the then Minister of Labour, the Hon. John P. MacBeth, Q.C., to appoint a person to replace Mr. Reville as Chairman of the Board of Arbitration. The Minister of Labour complied with the union's request and Mr. G. S. P. Ferguson, Q.C., as he then was, was appointed Chairman. The Board of Arbitration (Mr. Ferguson, Chairman, Mr. McKillop and Mr. Perly) commenced a hearing upon May 13, 1975. At that hearing, Mr. E. Stringer, Q.C., counsel for the company, argued that the Board, as it was then constituted, had no jurisdiction in the matter as the Minister of Labour had no authority under the terms of the Ontario Labour Relations Act to appoint a second Chairman. The Board of Arbitration, in a decision dated June 13, 1975 (Mr. Perly dissenting), declined to determine the matter of its jurisdiction and adjourned the hearing so that the Minister of Labour might be requested to refer the question of his authority to appoint Mr. Ferguson as chairman to the Ontario Labour Relations Board. That was, in the opinion of the majority, a necessary preliminary to its jurisdiction to deal with the merits of Mr. Kurk's grievance.

4. The next event of significance occurred on July 19, 1976, when Mr. Ferguson was appointed to the County Court of Ontario.

5. On November 23, 1976, a request was made to the present Minister of Labour, the Hon. Dr. Bette Stephenson, by the union for the appointment of a new person to constitute a board of arbitration. On January 24, 1977, the Minister referred to this Board the question of her authority to appoint a person to constitute a board of arbitration under section 37(4) of the Labour Relations Act.

6. Section 37(4) provides that:

Notwithstanding subsection 3, if there is failure to appoint an arbitrator or to constitute a board of arbitration under a collective agreement, the Minister, upon the request of either party, may appoint the arbitrator or make such appointments as are necessary to constitute the board of arbitration, as the case may be, and any person so appointed by the Minister shall be deemed to have been appointed in accordance with the collective agreement.

Mr. Stringer contends, on behalf of the company, that the former Minister of Labour did not have authority under section 37(4) to make the appointment of Mr. Ferguson to replace Mr. Reville, and that there is no authority in the present Minister to appoint a new person as Chairman. His argument on both counts is that the statutory pre-condition to the exercise of the Minister's authority under section 37(4) has not been satisfied in that there has never been a "failure to constitute a board of arbitration under a collective agreement". What has happened is simply that a member of a duly constituted arbitration board has been prohibited from acting further by reason of a Court Order. But that cannot negate the

fact that a board of arbitration has already been constituted. The position of the company, in a nutshell, is that an arbitration board, once constituted, is, for the purposes of section 37(4), forever constituted, irrespective of whether its members retain the capacity to act.

7. This minimum interpretation of section 37(4) rests on the assumption, a rather difficult one, that a member of a board of arbitration who is unable, for any reason, to discharge his responsibilities can never be replaced in the absence of a specific provision in the collective agreement providing for his replacement, which is the situation on the reference.

8. But counsel argued strenuously that this result, strange as it may seem, cannot confer upon the Minister of Labour a jurisdiction which she does not have under The Labour Relations Act and that, at most, it reveals a “gap” in the law as it now exists. In support of this latter contention, counsel pointed out that The Labour Relations Act makes specific provision for the appointment of persons to fill vacancies in the membership of a conciliation board, in the case of the resignation or death of a member (section 21(1)), and in the membership of the Labour Relations Board from any cause (section 91(6)).

6. Viewed in isolation from its statutory context, the generality of the language of section 37(4) might appear to lend support to the argument that the Minister’s appointment power is limited to a situation where there has been a failure to constitute a board of arbitration from the start. However, when the language of the subsection is considered within the framework of section 37 as a whole, it is apparent that a more liberal interpretation is required than the one proposed by the company.

10. Section 37 contains an explicit statement of the fundamental role which grievance arbitration plays in the system of dispute resolution established by The Labour Relations Act. As well, it sets out the remedial authority available to the various decision makers in the arbitral area – the Labour Relations Board, the Minister of Labour, and arbitrators appointed pursuant to the terms of collective agreements.

11. A fundamental policy of The Labour Relations Act is that all grievances arising during the term of a collective agreement are to be settled without stoppage of work. To facilitate the achievement of this policy, the legislature has mandated in section 37(1) a procedure for the peaceful resolution of all contract grievances. Section 37(1) requires that;

Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

12. This mandatory policy is supported by a network of remedial provisions, a major objective of which is to ensure the right of a party to a collective agreement to have its grievances arbitrated. Section 37(2) deems a collective agreement to contain a model arbitration provision if it “does not contain such a provision as is mentioned in subsection 1”. Section 37(3) empowers the Labour Relations Board to modify the arbitration provision contained in a collective agreement or the model provision set out in subsection 2, in the event that the former is judged inadequate or the latter unsuitable. Section 37(4), as we have already seen, empowers the Minister of Labour to appoint an arbitrator or make such appointments as



are necessary to constitute a board of arbitration under a collective agreement. Section 37(6) grants the Minister the power to issue the necessary order where a decision of an arbitrator or an arbitration board has been unduly delayed. Finally, the recently-added section 37(5a) allows an arbitrator or an arbitration board, in the absence of a provision in the collective agreement to the contrary, to extend the time for the taking of any step in the grievance procedure.

13. Viewed within its statutory context, there can be little doubt that the legislative policy underlying section 37(4) is to ensure that any defects with respect to the appointment of an arbitrator or the constitution of an arbitration board can be cured by the Minister exercising a power of appointment.

14. From this broader statutory perspective, the matter which has been referred to us by the Minister can be seen as an example of the very type of situation for which section 37(4) was designed as a remedy – one in which a party's right to have its grievance arbitrated, pursuant to the terms of a collective agreement, could be frustrated by some deficiency in the appointment of the arbitrator or the constitution of the board of arbitration. Here the chairman of a board of arbitration, although properly appointed pursuant to the terms of a collective agreement, has been prohibited from acting as chairman by Order of the Supreme Court. Leaving aside for the moment the question of the effect of Mr. Ferguson's appointment to the Bench, the labour relations reality of the situation at hand is, for all intents and purposes, identical to that which would have obtained had the Board of Arbitration been without a chairman from the outset. To interpret section 37(4) so as to remedy only the latter frustration of the statutory policy mandated in section 37(1) would, in our view, be unnecessary and unduly restrictive.

14. Our conclusion is that there has been a failure to constitute a board of arbitration under a collective agreement within the meaning of section 37(4) and that The Labour Relations Act did confer jurisdiction on the former Minister of Labour under that section to appoint Mr. Ferguson, as he then was, to constitute a board of arbitration.

15. We would add that this more liberal approach to the construction of The Labour Relations Act is one that finds approval in the judgement of the Supreme Court of Canada in *White Lunch*, [1966] 56 D.L.R. (2d) 193. In that case, Mr. Justice Hall, speaking for the Court said:

“Whatever merit the arguments of the respondent had at the beginning of labour relations legislation, it seems to me that in the stage of industrial development now existing it must be accepted that legislation to achieve industrial peace and to provide a forum for the quick determination of labour management disputes is legislation in the public interest, beneficial to employee and employer and not something to be whittled to a minimum or narrow interpretation in the face of the expressed will of legislatures, which, in enacting such legislation, were aware that common law rights were being altered because of industrial development and mass employment which rendered illusory the so-called right of the individual to bargain individually with the corporate employer of the mid-twentieth century.”

16. That brings us to the question of whether the present Minister of Labour has authority to appoint a new person to act as Chairman now that Mr. Ferguson has been appointed to the Bench. Judge Ferguson is prohibited, as matters now stand, from continuing to act as Chairman of the Board of Arbitration by reason of section 37(1)(b) of the Judges' Act, R.S., c.157, s.1. That section states that:

"37.(1) No judge shall act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or on any inquiry or other proceeding unless

- (b) in the case of any matter within the legislative authority of the legislature of a province, the judge is by an Act of the legislature of the province expressly authorized so to act or he is thereunto appointed or so authorized by the lieutenant governor in council of the province."

17. Accordingly, our decision on the reference is that there is, again, at this time, a failure to constitute a board of arbitration under a collective agreement and that the Minister, therefore, has authority under section 37(4) of The Labour Relations Act to make the appointment of a person to act as Chairman and thus to constitute a board of arbitration under a collective agreement.

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**1961-76-R** Teamsters, Local Union No. 230, Ready-Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, (Applicant), v **Dennis Moran Limited; Dennis Moran (Barrie) Limited, (Respondent).**

**Successor status – whether sale of a business – whether employer bound by collective agreement.**

**BEFORE:** A. L. Haladner, Vice-Chairman, and Board Members H. Simon and J. D. Bell.

**APPEARANCES:** *Douglas J. Wray and Isaac Raymond for the applicant; George C Grossman and Arthur Torrie for the respondent.*

**DECISION OF THE BOARD; April 29, 1977**

1. This is an application under section 55 of The Labour Relations Act alleging a sale of a business by Dennis Moran Limited (D.M.) to Dennis Moran (Barrie). The applicant seeks a declaration that D.M. Barrie is bound by the collective agreement to which D.M. was bound prior to the sale, as well as a declaration that the applicant has the right to bargain on behalf of the employees of D.M. Barrie.

2. The applicant was certified on May 11, 1971 for an all-employee unit of D.M. On May 14, 1976, the applicant and D.M. entered into a collective agreement effective April 1, 1976 to March 31, 1977. The Agreement is stated to continue in full force and effect until a

new agreement is signed or until conciliation under The Labour Relations Act has been completed, provided either party gives written notice of its desire to amend the Agreement within 90 days of the expiration date. On December 23, 1976, the applicant was informed by letter from the solicitor for D.M. that the "assets and undertaking of Dennis Moran Limited had been sold to Dennis Moran (Barrie) Limited". On February 9, 1977, the applicant sent notice to D.M. Barrie of its desire to bargain for a new collective agreement.

3. D.M. Barrie has informed the applicant that it does not consider itself bound by the collective agreement between the applicant and D.M. It contended at the hearing that a sale of a business within the meaning of section 55 of The Labour Relations Act had not taken place and that the applicant, therefore, is not entitled to the relief sought. Its position was that there has been only a sale of the assets of the business, and not a sale of the business itself.

4. Mr. Arthur Torrie, the owner and President of D.M. Barrie, was called to give evidence of the transaction which the applicant alleges constitutes a sale of a business under section 55 of the Act. The transaction in question occurred on December 17, 1976. On that date, D.M. Barrie purchased from D.M. virtually all the assets used in its gravel mining, equipment and driver rental business. The purchase price of \$316,350 was allocated as follows:

Gravel pit and quarry license	\$165,000
Heavy construction equipment, shop and radio equipment	\$111,350
Class K public carriers licenses (for the transportation of heavy-duty equipment)	\$ 40,000

5. The transaction between D.M. and D.M. Barrie was carried out in accordance with an agreement for purchase and sale. That agreement was made conditional upon the parties obtaining the consent of the Ontario Highway Transport Board to the transfer of the Class K licenses from D.M. to D.M. Barrie. In the agreement, D.M. (the vendor) agreed to "do all and everything necessary to effect the transfer of any and all existing and transferrable licenses pertaining to the business to the purchaser (D.M. Barrie)". Further, D.M. consented to "the incorporation of a company under a name including the words 'Dennis Moran' and to either dissolve or wind-up the vendor or change the name of the vendor as soon as conveniently possible after closing". The evidence established that D.M. consented to the use of the name Dennis Moran (Barrie) Limited on June 14, 1976, and that D.M. Barrie was incorporated under that name on June 25, 1976. In the sales agreement, D.M. also agreed "to continue to operate the business known as Dennis Moran Limited in a good and reputable manner until closing".

6. The Board was informed by Mr. Torrie that D.M. had been in business for approximately 33 years and was well known in the Barrie area. Although he stated that no consideration was given by D.M. Barrie for the use of the name, Mr. Torrie was quite candid in admitting that it was important to him as purchaser to have the use of Dennis Moran's good name. Mr. Torrie was equally candid in admitting that from the date of the sale, D.M. Barrie has performed exactly the same type of work as its predecessor, D.M. and



also that some of D.M.'s customers remained with D.M. Barrie after the sale. In this regard, it is significant that, while the location of the business was moved from 29 Ann Street South, Barrie to 435 Tiffen Street, Barrie, D.M. Barrie retained the phone number formerly used by D.M.

7. At the time of the sale, there were about 15 employees on the payroll of D.M. As of the date of the Board's hearing, there were 5 employees working for D.M. Barrie, with an expectation of an increase to between 20 and 30 employees by July 1, 1977. Of the 5 employees presently employed by D.M. Barrie, 3 were formerly employed by D.M. Mr. Torrie testified that there was no interruption in their employment after the sale.

8. Section 55 of The Labour Relations Act provides that, where a business or part thereof is sold, leased, transferred or otherwise disposed of, the successor employer receives it subject to the collective bargaining obligations of its predecessor. In *Marvel Jewellery Limited and Danbury Sales*, [1975] OLRB Rep. Sept. 733, the Board has this to say about the legislative policy underlying section 55:

"Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership."

9. In determining whether there has been a sale or other disposition of a business within the meaning of section 55, the Board has regard to the totality of the transaction and places little reliance upon its outward legal form. Each case turns on its own particular facts. There are, however, two factors of general relevance. Perhaps the most important factor considered by the Board in section 55 cases is the nature of the work performed. If the work performed subsequent to the transaction, is not substantially different from the work performed prior to the transaction that is normally strong evidence that there has been a section 55 disposition. Another important factor is the transfer of goodwill. In this connection, it is well established that the presence or absence of goodwill as an itemized factor of sale is not decisive. The important consideration is whether the goodwill has, in fact, been transferred.

10. Our conclusion in this case can be summed up quite simply. This is an example of the very kind of disposition in respect of which section 55 was intended to preserve bargaining rights. Although the formal legal transaction may have given the appearance of a sale of assets, the assets were purchased in their entirety and were used to continue the business in exactly the same manner as it operated prior to the sale. After the sale, D.M. Barrie continued to work its gravel pit and to rent out its equipment and drivers (some of whom were former employees of D.M.) just as its predecessor had done before it. In order to do this, it required D.M.'s quarry and Class K public carrier licenses; and, to that end, D.M. agreed to do everything necessary to effect their transfer. In addition, the sale was made conditional upon the parties obtaining the consent of the Highway Transport Board to the K licence transfers.

11. Although there was no specific sale of goodwill in the form of a covenant not to compete, or the acquisition of existing contracts or customer lists, D.M. Barrie has continued to derive the benefit of the reputation and good name which D.M. built up in the course of 33 years of business in the Barrie area. It has continued to use the name Dennis Moran; and this with the consent of D.M. and with the assurance of that company that it would either wind up or change its name as soon as conveniently possible after the sale. There was, moreover, provision in the sale agreement for the maintenance of good name and the continuation of the business up to the date of the actual transfer. As well, D.M. Barrie retained the telephone number of its predecessor, no doubt so that the customers of D.M. would follow the new corporation along with the land, equipment, licenses and some of the employees.

12. In sum, the business of D.M. was purchased by D.M. Barrie as a going concern despite the outward appearance of a sale of assets.

13. It is the Board's decision, therefore, that there has been a sale of the business of Dennis Moran Limited to Dennis Moran (Barrie) Limited. Accordingly, we declare that Dennis Moran (Barrie) Limited is bound by the collective agreement between Teamsters' Local Union No. 230, Ready-Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers and Dennis Moran Limited, and that the applicant has the right to bargain on behalf of "all employees of [Dennis Moran (Barrie) Limited] employed at and working out of Barrie, save and except foremen, persons above the rank of foreman, and office staff", which is the unit described in the collective agreement.

**0018-77-R Service Employees Union, Local 204, (Applicant), Kilean Lodge Incorporated, (Respondent).**

**Certification – Whether notice adequate to objecting employees.**

**BEFORE:** M.G. Picher, Vice-Chairman, and Board Members H. J. F. Ade and H. Simon.

**APPEARANCES:** *R. Davidson for the applicant; William S. Gardner and Burrell Morris for the respondent.*

**DECISION OF THE BOARD:** April 29, 1977

1. The name "Kilean Lodge" appearing in the style of cause of this application as the name of the respondent is amended to read: Kilean Lodge Incorporated".
2. This is an application for certification.
3. By telegram dated April 13, 1977, the respondent requested an extension of the terminal date. At the hearing counsel for the respondent advised the Board that the respondent received notice of the instant application from the Registrar of the Board on April 12, 1977 and therefore posted the Form 5 *Notice to Employees of Application for Certification and*

of *Hearing* that same day in the staff room and at both nursing stations in the respondent's nursing home.

4. The Form 5 notice or "green sheet" in this case contains the following:
  3. The terminal date fixed for this application as directed by the Board is the 15th day of April, 1977.
  4. Any employee or group of employees affected by the application and desiring to make representations to the Board in opposition to this application must send to the Board a statement in writing of such desire, which shall,
    - (a) contain the return mailing address of the employee or representative of a group of employees;
    - (b) contain the name of the employer concerned; and
    - (c) be signed by the employee or each member of a group of employees.
  5. The statement of desire must be,
    - (a) received by the Board not later than the terminal date shown in paragraph 3; or
    - (b) if it is mailed by registered mail addressed to the Board at its office, 400 University Avenue, Toronto 2, mailed not later than the terminal date shown in Paragraph 3.
  6. A statement of desire that does not comply with paragraphs 4 and 5 will not be accepted by the Board.

5. The respondent states that the period of notice should be four clear days, apart from the day of posting and the terminal date, and the time from April 12 to April 15, inclusive, is insufficient time for the employees to consider their position in relation to the application.

6. It was brought to the Board's attention that besides posting the green sheets the employer sent personally addressed letters to each of its employees. The letter, dated April 14, 1977, contains the following.

As you probably already know, the *Service Employees Union, Local 204* have filed an application for certification with the Ontario Labour Relations Board, (the O.L.R.B.). I have enclosed with this letter a copy of the *Notice to Employees* sent by the O.L.R.B. You should read it *carefully*. You will see that the *Notice to Employees* mentions that the "terminal date" for this application is April 15, 1977. Unless membership cards or letters or petitions to the O.L.R.B. are received by the O.L.R.B. or post-marked by registered mail *no later than* the terminal date, the O.L.R.B. will ignore them. You should



know that I have requested that the O.L.R.B. extend the terminal date, because I do not think that the present date gives you enough time to truly make up your mind.

...The choice of whether you want a union, or which one you want, will be among the most important decisions you may ever make. Once a union gets in, it is very difficult to change that fact. You should not make a decision until you have considered it very carefully, and heard all sides. If you have made a hasty decision, you are still allowed to change your mind, if you do so before the end of the terminal day. You may send a letter to the O.L.R.B., or sign a petition, or sign a membership card of the other union.

The "other union" is a reference to the Christian Trade Union which was conducting a rival organizing campaign among the respondent's employees at the time of the application.

7. The terminal date in the instant case was set by the Registrar pursuant to section 2 of the Board's Rules of Procedure:

2. When an application is made, the registrar shall fix a terminal date for the application which shall be not less than five and not more than ten days, as directed by the Board, after,
  - (a) the day on which the registrar serves the employer with the notice of application for posting, where they are served personally; or
  - (b) the day immediately following the day on which the registrar mails the notices of application to the employer for posting, where they are served by mail.

The documents relating to this application were mailed to the respondent on Wednesday, April 6, 1977 and the terminal date was accordingly fixed for some nine calendar days later or six days later if the statutory holiday of Good Friday and Easter Sunday are excluded for the purposes of computation as required by section 1(2) of the Rules. The period of days between the mailing of the documents by the Registrar and the terminal date is, therefore, within the range of days prescribed in the Rules of Procedure.

8. The Board's power to vary the terminal date is set out in section 57(2) of the Rules of Procedure:

57. (2) The Board may, upon such terms as it considers advisable, enlarge the time prescribed by these Rules for doing any act, serving any notice, filing any report, document or paper or taking any proceeding and may do so although application therefor is not made until after the expiration of the time prescribed.

9. In the instant case the notices were posted for four days including the day of posting and the terminal date. A survey of the Board's jurisprudence indicates that the Board has at times considered four days' notice to be sufficient and has declined to extend the terminal date (e.g. *Zenith Electric Supply (Ontario) Limited* [1964] OLRB Rep. Dec. 456). At

other times it has found four days to be an insufficient period of notice (e.g. *University of Toronto* [1967] OLRB Rep. Aug. 604). The Board's approach in such cases has been to avoid fixing any rigid formula to determine whether the employees in any given application have been given adequate notice. Where a request for an extension of the terminal date is made the Board prefers to assess the merits of each request in the light of the particular fact surrounding it. Among the things the Board takes into account are:

1. The number of days the notice was posted.
2. The manner in which it was posted, including the frequency of locations of posting on the respondent's premises and whether it was sent to employees individually by mail.
3. The number of employees in the bargaining unit and the frequency of their presence on the premises during the time of posting, having particular regard to shifts and days off.
4. Whether any delay in posting is attributable to the employer.
5. Whether the request for an extension is made by the employer alone or by a group of employees. This may be especially relevant where employees have made no request for an extension of time and posting was delayed by the employer's own conduct.

(see, Generally: *Lanark Mills Ltd.* [1965] OLRB Rep. Aug. 356 *Joesug Realty Ltd.* [1966] OLRB Rep. July 278; *The Breithaupt Leather Company Limited* [1966] OLRB Rep. Dec. 734; *Dominion Sport-Service Limited* [1967] OLRB Rep. June 266; *J. H. McNairn Limited* [1973] OLRB Rep. Feb. 90).

10. When it considers a request for an extension of the terminal date the Board must concern itself with balancing the interest of all employees who are entitled to have fair and adequate notice of the proceedings and the interest of the applicant and the employee who have chosen to be represented by the applicant to have the application disposed of without any undue or prejudicial delay. The Board's concern with reasonable expedition in certification applications and the reasons for that concern are well articulated elsewhere: (e.g. *Nick Masney Hotels Ltd.* [1970] 70 CLLC 14,020 (Ont. C.A.); *Trench Electric Limited* [1976] OLRB Rep. Apr. 170; *York University* [1976] OLRB Rep. Apr. 187 at 192).

11. Turning to the merits of the instant case the Board notes that the notices were posted for four days in three locations on the employer's premises. As well copies were dispatched to each employee with an explanatory letter from the employer. The bargaining unit is relatively small, being some 17 full time employees and it is common ground that all of the employees, who work on a rotation of 5 days on and 2 days off, were on the premises during the period of posting. No employee has presented himself before the Board to join in the employer's request for an extension of the terminal date. Moreover, the Board has received timely statements of desire in the form of letters filed by two individual employees expressing their objection to the instant application. That may reasonably be viewed as a *prima facie* indication that sufficient time was afforded employees who intended to respond to the Board's notice.

12. In these circumstances we see no reason to subject the instant application and the rights of the affected employees to any further delay. The request for an extension of the terminal date is denied.

13. As the Board noted at the hearing neither of the objecting employees had previously signed membership documents in support of the applicant. Since their view, if voluntary, could not cast doubt upon the membership strength of the applicant, the Board did not enter upon a inquiry into the voluntariness of the statements of desire.

14. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

15. Having regard to the agreement of the parties, the Board further finds that all employees employed by Kilean Lodge Incorporated, Grimsby, in the County of Lincoln, save and except Professional Nursing Staff, Physiotherapists, Occupational Therapists, Supervisors, Foremen, persons above the rank of supervisor or foremen, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

16. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 15, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. A certificate will issue to the applicant.

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**2114-76-JD B.N. Tile & Terrazzo Co. Ltd., (Complainant), v. United Brotherhood of Carpenters and Joiners of America, Local 2486 and Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers & Allied Craftsmen, Local 28 and Acme Building and Construction Limited and Acme-Lansdowne/Joint Venture, (Respondents).**

**Jurisdictional dispute – arbitration – practice – procedure – effect of filing of grievance under section 112a as well as jurisdictional dispute – whether Board will entertain union's grievance prior to employer's jurisdictional dispute claim.**

**BEFORE:**R.A. Furness, Vice-Chairman, and Board Members H.J.F. Ade and E. Boyer.

**APPEARANCES:** *G. Grossman, E. Savignac and J. Grossi appearing for the complainant and The Terrazzo, Tile and Marble Guild of Ontario, Inc.; P.E. Guerton appearing for Local 2486;*



*R. Koskie and D. DeMonte appearing for the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 28; and Jonathan D. Spiegel appearing for Acme Building and Construction Limited and Acme-Lansdowne/Joint Venture.*

#### **DECISION OF THE BOARD: April 19, 1977**

1. The complainant requests that the Board issue a direction under section 81 of The Labour Relations Act with respect to certain work.

2. In the *Acme Building and Construction Limited* case, Board File #1812-76-M, the United Brotherhood of Carpenters and Joiners of America, Local 2486 ("Local 2486") has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.

3. Local 2486 argues that the Board should entertain the grievance in Board File #1812-76-M before it considers the instant complaint. The other parties opposed the position of Local 2486 and argued that the Board ought to proceed with the instant application and then proceed with the grievance in Board File #1812-76-M.

4. After considering the representations of the parties the Board ruled that it would initially proceed with the instant complaint and would subsequently entertain the *Acme Building and Construction Limited* case, Board File #1812-76-M. Reasons for the oral ruling of the Board now follow.

5. It appears to the Board that the instant complaint and the grievance arise from the performance of certain work by members of the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 28 rather than by members of Local 2486.

6. The circumstances relating to the instant complaint and the grievance have previously been considered by the Board in the *Artex Precast Limited* case (Board File #1733-75-JD, unreported decision dated May 28, 1976). In that case an application had been filed under section 112a and a complaint had been filed under section 81. It was argued by the trade union which had filed the grievance that the Board should dismiss the complaint and entertain the grievance. The Board rejected this argument and in paragraph 7 of that decision stated:

"7. With reference to the matters raised by Local 38, the Board finds no reason not to entertain this request for a direction. The fact that Local 38 has filed a grievance against Poole does not affect the merits of this request for a direction. The arbitration of a grievance under a collective agreement essentially affects the parties to the collective agreement. When the essence of a grievance appears to be closely related to an assignment of particular work, arbitration does not provide a forum for other affected trade unions and employers. In these circumstances arbitration merely deals with the symptoms of an assignment of particular work, whereas a complaint under section 81(1) leads to a final and binding resolution of a dispute over an assignment of particu-

lar work. The remedies are different and the parties are different. In our view, proceedings under section 81 provide a more basic or elemental approach to disputes which essentially arise out of the assignment of particular work."

7. Although the Board will proceed with the instant complaint the grievance may be considered subsequently. In the event that the Board determines that it does have jurisdiction to entertain the grievance and Local 2486 succeeds on the merits, then it will still be possible to provide compensation with respect to any violation of the relevant collective agreement.

8. The Registrar is directed to list the complaint for hearing on the merits and to hold the grievance in abeyance until further notice. The Board requests the parties to ascertain whether they are able to agree on a description of the work which is in dispute.

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**2137-76-U Upholsterers' International Union of North America A.F.L. - C.I.O.; (Complainant), v. Craftline Industries Limited, (Respondent).**

**Section 79 – practice – procedure – effect of complainant alleging multiple violations some of which call into play the reverse onus provisions – whether these aspects of the complaint should be severed – whether the Board will entertain evidence of previous complaints which have been withdrawn.**

**BEFORE:** Kevin M. Burkett, Vice-Chairman and Board Members J.D. Bell and H. Simon.

**APPEARANCES:** *B. Chercover and Clare Hawkshaw for the applicant; W.J. McNaughton and H. Gancman for the respondent.*

**DECISION OF THE BOARD:** April 3, 1977

1. This is a complaint filed under section 79 of the Act alleging violations of sections 14, 56, 58, 61, 70 and 71 of the Labour Relations Act. This matter came on for hearing on April 19, 1977 at which time a number of preliminary issues were raised and argued by the parties. The Board adjourned the proceedings pending its disposition of the preliminary matters. The parties agreed to meet in the interim and attempt to resolve the outstanding issues between them.

2. Certain of the alleged violations of the Act in this matter cast upon the employer the "reverse onus" as set out in section 79(4a) of the Act (i.e., the alleged violations with respect to sections 58 and 61 of the Act). The other alleged violations of the Act, i.e. sections 14, 56, 70 and 71 do not call into play the "reverse onus" as set out in section 79(4a) of the Act and accordingly the complainant is required to establish these alleged violations on the balance of probabilities. The respondent in this matter has asked the Board to sever those aspects of the complaint which cast the "reverse onus" upon it from those aspects of the case which do not, and in the alternative the respondent has asked the Board to require the complainant to proceed first if all the alleged violations are to be heard as a single com-

plaint. The Board is not prepared to sever the complaint along the lines suggested by counsel for the respondent. To do so would not only prove costly to the parties and to the Board, but would also prolong the time required to dispose of these serious complaints. The Board, however, in view of its decision to hear all of the matters before it as a single complaint, and in view of the protracted time frame vis-a-vis the alleged pattern of unlawful activity, hereby declares and serves notice upon the complainant that it will be required to proceed first with its evidence with respect to all of the alleged violations. Notwithstanding the order of procedure the Board will apply the "reverse onus", as set out in section 79(4a) to those allegations to which it has application.

3. Counsel for the respondent in this matter has relied upon Rule 47(1) of the Board's Rules of Procedure and has asked that additional particulars be provided so that he might properly prepare his case. The Board has reviewed his submissions in this regard and those of the complainant and hereby directs the complainant to provide additional particulars as set out below:

- (1) *Re paragraph 4, Schedule 'C'*: The complainant is directed to supply to the respondent the file numbers of the specific section 79 complaints upon which it intends to rely and the names of the employees who were allegedly discharged for their union activity.
- (2) *Re paragraph 7, Schedule 'C'*: The complainant is hereby directed to supply the respondent with the names of the employees allegedly discriminated against and the time and place of the alleged discrimination and to confirm that the previous complaints cited in paragraph 7 are those referred to in paragraph 4.
- (3) *Re paragraph 14, Schedule 'C'*: The complainant is directed to provide the names of the employees who were instructed to prevent Jamie's production from equalling that of other operators on the same machine and the names of the persons who allegedly issued these instructions.
- (4) *Re paragraph 18, Schedule 'C'*: The complainant is directed to provide the names of those members of management who were seen to observe employees on the picket line on March 9, 1977.
- (5) *Re paragraph 20, Schedule 'C'*: The complainant is directed to set out the time and place of the specific acts of intimidation directed against Clarence Samuels and the names of those persons allegedly performing such acts.

In view of the complainant's concern that it might be jeopardizing those persons who were instructed to impede Jamie's production (subsection 3 above) if it divulged their names the Board hereby records the complainant's concerns in this regard and assures the complainant that if these persons are dealt with contrary to the Act they will be protected to the fullest extent of the Board's remedial authority.

4. The substance of the alleged violations set out in paragraph 19 of Schedule 'C' forms the basis of a complaint which has been laid under the Criminal Code against Mr.



Gancman. In view of the natural justice implications the Board hereby informs the parties that it will not permit evidence with respect to the incident referred to in paragraph 19 to be adduced before it. If at the conclusion of the case the Board is of the opinion that such evidence is required to make a finding under the Act, it will at that time decide if it should await Mr. Gancman's testimony in the Criminal Courts or if it should hear his evidence notwithstanding the criminal proceedings.

(5) The Board is not prepared to find that the complainant has engaged in an abuse of process by virtue of having filed a series of section 79 complaints against the respondent which have either been settled or withdrawn. The practice and procedures of the Board are designed to encourage settlement as an alternative to litigation. The parties are free to settle on whatever basis is mutually acceptable to them and in the circumstances of this case the Board is not prepared to infer that the previous complaints have been frivolous ones solely designed to force concessions at the bargaining table. The Board would point out, however, that the evidence adduced in respect to the prior complaints will be admitted for the limited purpose of establishing a pattern of unlawful activity and not for the purpose of gaining redress for the alleged unlawful activity.

(6) The matter is referred to the Registrar.

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**1773-76-R** Local Union 636 – International Brotherhood of Electrical Workers, AFL-CIO-CLC, (Applicant), v. **Deseronto Public Utilities Commission**, (Respondent), v. Local Union 1678 International Brotherhood of Electrical Workers, (Predecessor Trade Union).

**Successor Status – whether trade union properly the successor of predecessor union.**

**BEFORE:** Ian C.A. Springate, Vice-Chairman and Board members H.J.F. Ade and E. Boyer.

**APPEARANCES:** *Ken Woods, L. Barr and L. Cox for the applicant; Carl Kaestner for the respondent; L. Barr for the predecessor trade union.*

**DECISION OF THE BOARD:** April 4, 1977

1. This is an application under section 54 of The Labour Relations Act whereby Local Union 636 International Brotherhood of Electrical Workers, AFL-CIO-CLC ("Local 636") claims that by reason of a merger, amalgamation or transfer of jurisdiction it is the successor of Local Union 1678 International Brotherhood of Electrical Workers ("Local 1678") and as such has acquired the rights, privileges and duties of local 1678.

2. Local 636 filed with the Board a number of documents which set out the procedure by which local 1678 was amalgamated into local 636 effective from January 1, 1977. At the hearing the representative of the respondent indicated that he was not challenging the procedures utilized to effect the amalgamation and neither was he challenging the conduct

of the votes which proceeded the amalgamation. He did, however, raise a number of the respondent's concerns relating to the possible consequences of a declaration under section 54, and requested that having regard to these concerns the Board dismiss the application.

3. Prior to the amalgamation of local 1678 into local 636, local 1678 was the bargaining agent for certain employees of a number of public bodies in the Kingston, Deseronto, Napanee and Gananoque areas. Local 636, however, is a much larger local which has bargaining rights for a considerable number of public utilities and hydro-electric commissions throughout southern Ontario.

4. The representative of the respondent expressed the concern that the amalgamation of local 1678 into 636 could result in demands for higher wages during negotiations which in turn could create serious problems for a town the size of Deseronto. He also expressed concern over the possibility that the long-term goal of the applicant might be to eventually represent all public utility workers in the province and to negotiate a province-wide "master agreement."

5. The matters raised by the respondent are clearly of real concern to it. At the hearing the representative of the applicant sought to address himself to these concerns. The Board's position in all this, however, is merely to ensure that a claimed merger, amalgamation or transfer of jurisdiction has in fact occurred, and it has to then declare what results have flowed from the merger, amalgamation or transfer of jurisdiction. This in turn requires that the Board scrutinize the procedures adopted by the trade unions concerned, with particular emphasis on the procedures adopted by the predecessor trade union, so as to ensure that those procedures conform with the union's constitution (in this case the constitution of the International Brotherhood of Electrical Workers) as well as the law as it has developed in relation to union mergers and amalgamations. (A discussion of certain aspects of the law in this regard is set out in the Board's decision in the *Brewer's Warehousing Company Limited* case, [1974] OLRB Rep. July 461.) Issues such as those raised by the respondent are not relevant to the legal question as to whether or not a purported merger, amalgamation or transfer of jurisdiction has in fact been properly carried out. Further, we are of the view that once the Board is satisfied that a merger, amalgamation or transfer of jurisdiction has been effected, it would be contrary to the purpose and intent of section 54 for the Board to refrain from making a declaration to that effect on the basis of the respondent's concerns. This is not to say that certain aspects of the bargaining relationship between the parties may not undergo change. However the law does recognize that union mergers, amalgamations and transfers of jurisdiction may occur such that a successor union may replace or substitute for a predecessor union in a bargaining relationship with an employer. Necessarily following from this is the fact that an employer may find itself in a bargaining relationship with a union different from that it is accustomed to dealing with, and that this "new" union may possibly adopt policies and procedures different from that of its predecessor.

6. We feel it is worth stressing at this point that a declaration under section 54 has no greater effect than to substitute one union for another in a bargaining relationship. The bargaining rights and privileges possessed by the successor union are no greater than, or different from, the rights and privileges formerly possessed by the predecessor union.

7. Having regard to all of the evidence before it, the Board finds, and accordingly declares pursuant to section 54(1) of The Labour Relations Act, that Local Union 636 – In-

ternational Brotherhood of Electrical Workers, AFL-CIO-CLC has acquired the rights, privileges and duties of Local Union 1678 International Brotherhood of Electrical Workers, which was the bargaining agent for a unit of employees of the respondent defined in a collective agreement between the respondent and the predecessor trade union.

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**0241-76-R; 0496-76-U.** Labourers' International Union of North America, Local Union #493, (Applicant), v. **Winson Construction Limited**, (Respondent), v. Group of Employees, (Objectors).

**Reconsideration – whether subsequent conviction of employer for violation of Act sufficient grounds for reconsideration of earlier refusal to grant certification pursuant to Section 7a.**

**BEFORE:** Ian C.A. Springate, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

**DECISION OF IAN C.A. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER J.D. BELL:** April 12, 1977

1. The applicant has requested that the Board reconsider its decision of November 26, 1976 in this matter.
2. In its request for reconsideration the applicant contended that the Board erred in finding that the respondents had not breached section 58(c) and 61 of the Act. We have carefully reviewed the applicant's submissions in this regard but remain of the view that the evidence led before us did not establish that these two sections had been breached. However, as noted in our earlier decision, we are of the view that the respondents did interfere in the selection of a trade union by employees and that by so doing they did violate section 56 of the Act.
3. In its request for reconsideration the applicant expressed concern that the majority award of November 26, 1976 seemed to suggest that section 7a would not be available to a union unless it had filed sufficient evidence of membership to entitle it to at least a representation vote. This concern is stated to arise from a portion of paragraph 8 of the majority decision. The sentence complained of, along with the sentence preceding it, state as follows:  

“The effect of applying section 7a is to take an application out of the normal certification procedures. While the full scope of this section has yet to be determined, it appears that its application may result in a union being certified automatically even though its membership position is such that it would normally be required to win a representation vote before it could be certified.”

The issue before the Board was whether or not the respondent employer's actions subsequent to the union's organizing campaign justified certification pursuant to section 7a in a situation where otherwise it could only be certified if it were selected by a majority of employees casting ballots in a representation vote. The above excerpt from the majority award



reflects this situation. The question as to the minimum amount of membership support which a union must have before it can be certified pursuant to section 7a has to date not been dealt with by the Board, and nothing in the majority decision was meant to indicate what position the Board might take when that issue does come before it.

4. The applicant has expressed the opinion that the majority erred with respect to its decision relating to the applicability of section 7a. In particular it contended that in the past the Board has consistently refused to direct the taking of a representation vote where it feels that employees may have been influenced by the actions of management to sign a statement of desire, and that therefore the majority's refusal in this case to disregard the vote already taken was completely contrary to the Board's own recognized practice. As noted in the majority decision of November 26, 1976, the Board has in fact consistently refused to exercise its discretion and direct the taking of a representation vote on the basis of a statement of desire which employees may have been influenced into signing by the actions of management. This, however, relates to situations where the union concerned has filed evidence of membership on behalf of more than 55 per cent of the employees in the bargaining unit. In the instant case the applicant failed to file evidence of membership on behalf of more than 55 per cent of the employees. Further there is no general policy of the Board which stands for the proposition that a set of facts which would cause the Board to decline to order a representation vote where a union has filed evidence of membership on behalf of more than 55 per cent of employees, would also cause the Board to certify a union pursuant to section 7a where it has failed to meet the statutory 55 per cent requirement. (See, for example, *Smith Beverages Limited*, [1975] OLRB Rep. Dec. 956 and *Robin Hood Multifoods Limited*, [1976] OLRB Rep. May 250.) The majority, therefore, is of the view that it has not acted in a manner that is contrary to the Board's recognized practice.

5. On a somewhat more general basis the applicant also contended that the majority came to the wrong conclusion in deciding not to apply section 7a to the facts of this case. We are of the view that the respondents engaged in unlawful acts which cannot be condoned. With respect to the request to apply section 7a, however, the issue before the Board was whether or not these actions would, on the balance of probabilities, affect the way employees voted in a secret ballot conducted by the Board some six weeks later in time. After assessing all of the evidence, including the testimony of the two employees involved, we came to the conclusion that the applicant had failed to demonstrate on the balance of probabilities that the true wishes of employees in the bargaining unit were not likely to be ascertained from the results of the representation vote. We have carefully reviewed the lengthy representations filed by both parties with respect to this request for reconsideration. Having done so, however, we remain of the view that the applicant has failed to demonstrate on the balance of probabilities that the true wishes of employees in the bargaining unit are not likely to be ascertained from the results of the representation vote and that, therefore, it has failed to establish its right to be certified pursuant to section 7a.

6. The request for reconsideration is denied.

#### **DECISION OF BOARD MEMBER O. HODGES.**

1. I dissent.

2. On the reconsideration of this matter, the Board was asked to again turn its attention to the issue of whether certification should be granted pursuant to Section 7a of The Labour Relations Act. In the original decision and in a majority decision on the reconsideration, the relief requested under Section 7a was denied. The majority seems capable of finding a serious violation of the Act while at the same time determining that it would still be possible to ascertain the true wishes of the employees in the bargaining unit. Having heard all the evidence in the matter, I am persuaded that the action of the employer interfered with the ability to truly ascertain the true wishes of the employees.

3. In a decision of this Board dated 27th of October, 1976, this Panel of the Board consented to the institution of prosecution of the respondents for the violations of The Labour Relations Act. It has been called to our attention that a prosecution was actually commenced in the Provincial Court and that as a result of this prosecution the defendant, Winslow Construction Ltd., was convicted and a fine of \$2,500 was imposed by the Judge.

4. It seems clear to me that the misconduct of the respondent which was sufficiently clear to the Provincial Court so as to satisfy the Court that an offence had been committed beyond a reasonable doubt can create only one presumption in the minds of the Board. Specifically, it is my distinct feeling that the action of the respondent in subverting the free selection process had to be logically seen as affecting the ability of the bargaining unit members to express their true feelings when the vote was taken. If violations of this nature do not result in certification under 7a of the Act, this Board is, in effect, indirectly sanctioning the employer and/or his agents in undertaking violations of this Act and corrupting the voting process.

5. In my opinion, the Board, having found a violation of the Act and this finding having now been reinforced by a Court imposing serious penal sanctions should raise the issue of whether or not the employees really were left with any free choice or the ability to truly express their wishes. I suggest that a presumption was created that the thought processes of the employees have been affected by the employer's activity and I do not believe that this presumption was in any way rebutted.

6. The size of the bargaining unit and the extent to which the employer interfered with that relatively small unit, in my mind, creates only one assumption, namely, that the employees could not freely vote or express their true wishes. The direct improper contact by the employer and/or its representatives with two of the four members of the unit had to affect that balance of freedom which the Act requires where certification is being sought. The employer has failed, in my opinion, to raise any question as to the overall negative effect of its conduct on the free choice of the bargaining unit. If this employer had employed a bargaining unit constituted of many persons, the improper approach to two members of the unit and the pressure brought to effect their rights might not be of very serious consequences. However, where the total unit consisted of four persons, an approach to two of them involving an improper revelation of the employer's position on the issue of unionization has to be of such a serious nature as to almost automatically invoke Section 7a. To turn a blind eye to the number of persons involved and the dynamics of the group is to ignore the realities of labour relations. Furthermore, to have failed to grant the relief requested under 7a initially, and now again in the reconsideration is to sanction the employer acting exactly as this employer has and to arm employers similarly situated with the very weapons that Section 7a was intended to combat.

7. While there is no onus in relation to Section 7a as appears in Section 79(4a) of the Act, one is compelled to realize that without the invocation of 7a in a case such as this, we may see a rush of similar type activity which would nullify the overall effect of 7a. I would grant the reconsideration and I would have on the reconsideration granted the relief originally requested and direct the certification.

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**1682-76-M Ontario Allied Construction Trades Council (Applicant), v. The Electrical Power Systems Construction Association, (Respondent).**

**Arbitration – Section 112a – whether employer has complied with layoff provisions of collective agreement.**

**BEFORE:** A.L. Haladner, Vice-Chairman, and Board Members H.J.F. Ade and M.J. Fenwick.

**APPEARANCES:** *Douglas J. Wray, W.W. Lippett, C.N. Lacombe and W.W. Tiller for the applicant; Harvey Beresford, G.A. Pickell and Gerald Vasey for the respondent.*

**DECISION OF THE BOARD:** April 12, 1977

1. This is a referral of a grievance to the Board for final and binding determination pursuant to section 112a of The Labour Relations Act.

2. The applicant and the respondent are parties to a collective agreement which applies to, among others, employees of “employers engaged in work for the Generation Projects Division...in the province of Ontario for Ontario Hydro...”. The Agreement consists of a master portion and a number of trade appendices including one for each of the seven international unions belonging to the applicant. The grievance before us is over the interpretation of the provisions of the collective agreement dealing with the manner in which employees, covered by the appendix relating to the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (the Teamsters appendix) are to be laid off work.

3. The layoff procedure is set out in Article 12.1(b) of the Teamsters appendix. That Article provides, in material part:

“The layoff of employees covered by this Agreement shall, in general, be governed by...

(b) length of continuous service with the Employer...applicable within their Trade Group (one of Group A, B, C, D or Warehouseman) at the project... – if capability and performance are approximately equal...”.



2. The layoff in question took place on February 19, 1976. On that date, Mr. P.L. Balfour was laid off and Mr. G. Vasey was retained in employment by Ontario Hydro (the "employer"). The relevant particulars of the two employees' employment record are as follows: Mr. Vasey commenced employment with the employer on December 3, 1968. On February 2, 1976, he was transferred from the Wesleyville Generating Station to the Pickering Generating Station, where he has remained to the date of the Board's hearing. The grievor, Mr. Balfour, commenced employment with the employer on June 16, 1975 at the Pickering Generating Station, where he remained until he was laid off on February 19, 1976. Mr. Vasey and Mr. Balfour are both warehousemen and have worked in that trade group since the inception of their respective terms of employment with the employer.

3. The union contended that Mr. Balfour had been laid off in contravention of Article 12. Its argument was that although Mr. Vasey had greater seniority with the employer overall, Mr. Balfour had greater seniority for the purposes of layoff. Accordingly, Mr. Balfour should have been retained in employment and not Mr. Vasey. The respondent's position that Mr. Vasey had been properly retained within the meaning of Article 12.1(b) and that Mr. Balfour had been properly laid off.

4. Because the union did not take the position that Mr. Balfour had greater capability and performance than Mr. Vasey, the Board decided to hear the matter in two stages – the first to determine the question of which of the two employees had the greater seniority for the purposes of layoff, assuming that capability and performance were approximately equal; and the second to determine the issue of relative capability and performance in the event it was determined that Mr. Balfour's layoff seniority was the greater. (The respondent's position was that capability and performance were not equal and that Mr. Vasey had capability and performance above that of Mr. Balfour.)

5. The Collective Agreement envisages employees being employed at a number of projects of which there are currently six spread over the province. As well, it envisages key employees in all the trade groups being moved from project to project. That contingency is unequivocally expressed in Article 8 of the Teamsters appendix as follows:

#### KEY EMPLOYEES

8.1 Employers reserve the right to transfer employees from one location to another to effectively utilize their special skills, having regard for the special requirements of thermal, nuclear or hydraulic generation and transmission and transformation construction.

6. Given the multi-project nature of the employer's operation and the potential for employee transfers from one project to another, there are, as counsel for the respondent noted in his argument, three distinct types of seniority provisions which could have been negotiated to determine job entitlement in the context of layoff. The collective agreement could have provided that reductions in the employer's work force be carried out in accordance with seniority as accumulated within the province, within the project, or some hybrid combination of the other two. It should be noted, in this connection, that the parties were in agreement that the Collective Agreement prohibits cross-trade bumping – that whatever be the precise scope and application of an employee's seniority for the purposes of layoff, it is limited to the employee's particular trade group, in this case, warehousemen.

7. The Collective Agreement could have provided that seniority for the purposes of layoff would be based solely on the employee's length of continuous service with the employer with the result that, if a reduction in the work force was necessary at a particular project, the employer would be required to lay off the employee with the least seniority in the province, irrespective of whether he was located at the project in question, which he would normally not be. It must be obvious that this would involve considerable dislocation of human and material resources to the detriment of both the employer and the employees. Neither party contended that this was the type of layoff procedure which the parties had agreed upon.

8. Alternatively, the Collective Agreement could have provided, as the applicant contends it has done, for job protection in the event of layoff on the basis of length of continuous service at the project only. That would mean that an employee who had been transferred from one project to another would stand to lose his employment in a layoff situation to an employee with less continuous service with the employer but greater continuous service at the particular project in question, provided, of course, that capability and performance were approximately equal. This kind of seniority provision would afford little protection to long-service employees of the employer. As well, it would provide little stability for the employer in terms of its work force.

9. Finally, the Collective Agreement could have provided, as the respondent contended it has done, that an employee's seniority for the purposes of layoff would be based on length of continuous service with the employer, but that it would only be exercisable by those employees who were employed at the project at which the layoff was to take place.

10. In our view, the interpretation proposed by the respondent is the only interpretation which can fit comfortably within the language of Article 12.1(b) as it is grammatically structured. As counsel pointed out, Article 12.1(b) is divided into three distinct parts, each of which is clearly separated from the other two by means of dashes. The first part contains the parties' definition of seniority in the context of layoff: "length of continuous service with the employer". The second part sets out the manner in which that seniority is to be applied. It is to have application within the Trade Group at the project... The third part, which qualifies the first two, provides that the foregoing obtains provided "capability and performance are approximately equal", which is, for the purposes of this decision, the situation at hand. Viewed from this perspective, there can be no doubt that the layoff procedure proposed by the respondent is the one described in Article 12.1(b) of the Collective Agreement. In order for the applicant's interpretation to have had any merit, the words "at the project..." would have had to precede the first dash.

11. The interpretation proposed by the respondent is not only the one required by the language and structure of Article 12.1(b), it is also the one which makes the most sense in the context of the employer's operation. By restricting an employee's bumping rights in a layoff situation to the particular project in question, it avoids dislocation on a province-wide basis. Moreover, by maintaining the criterion of length of continuous service with the employer, it affords substantial protection to the employer's long-service employees. We can see no advantage from the point of view of the employer or from the point of view of the union which represents the employer's employees throughout the province, to allow the employer's key employees to be stripped of their seniority for purposes of layoff every time they are transferred from one project to another.

12. We therefore hold, on the basis of the language and structure of Article 12.1(b), as well as on the basis of what appears most sensible in terms of labour relations, that Mr. Vasey has greater seniority than Mr. Balfour for the purposes of layoff within the meaning of Article 12.1(b) of the Collective Agreement. Having arrived at this determination, it is unnecessary for us to go further and deal with the question of relative capability and performance. On the assumption that Mr. Vasey's capability and performance is at least approximately equal to that of Mr. Balfour, which is the assumption upon which we have proceeded, we hold that the layoff of Mr. Balfour was in accordance with the provisions of the Collective Agreement and that Mr. Vasey was properly retained in employment by the employer.

13. The grievance is dismissed.







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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1977

### BARGAINING AGENTS CERTIFIED DURING MARCH

#### No Vote Conducted

**0897-76-R:** The Newspaper Guild (Applicant) v. Sudbury Star, A Division of Thomson Newspapers Limited (Respondent).

Unit: "all employees in the circulation department of the respondent at Sudbury save and except circulation manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (22 employees in the unit). (*Having regard to the above determinations*).

**1150-76-R:** United Steelworkers of America (Applicant) v. Crane Canada Limited, Brantford Plant (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and technical employees of the respondent in Brantford, Ontario, save and except supervisors, persons above the rank of supervisor, one secretary to the plant manager and controller, one secretary to the personnel supervisor, professional engineers, a personnel assistant, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, students employed under a corporate, co-operative, university, or community college training program and persons covered by a subsisting collective agreement between Crane Canada Limited (Brantford Plant) and the United Steelworkers of America, Local 7480." (34 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision [1977] OLRB Rep. March).

**1607-76-R:** Local Union 1687 of the International Brotherhood of Electrical Workers (Applicant) v. A. R. Leslie Contracting Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**1743-76-R:** Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Guelph Beef Centre Inc. (Respondent) v. Ministry of Correctional Services (Intervener).

Unit: "all employees of the respondent at 785 York Road, Guelph, save and except foremen, persons above the rank of foreman, office and sales staff." (90 employees in the unit).

**1794-76-R:** United Rubber, Cork, Linoleum and Plastic Workers of America AFL CIO CLC (Applicant) v. Hemispheres International Mfg. Co. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (58 employees in the unit). (*Having regard to the agreement of the parties*).

**1818-76-R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Women's Christian Association of London (Parkwood Hospital) (Respondent).

Unit: "all employees of the respondent at London, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except professional medical staff, graduate nursing staff, under graduate nurses, graduate pharmacists, under graduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, chief engineer and office staff." (58 employees in the unit). (*Having regard to the agreement of the parties*).

**1841-76-R:** Hotel Restaurant Employees & Bartenders International Union, A.F.L., C.I.O., C.L.C., Local 604, Peterborough, Ontario (Applicant) v. Benson Hotel Ltd., Lindsay, Ontario (Respondent).

Unit: "all employees in all liquor outlets on the premises of the Benson Hotel Ltd., 24 Kent St. W., Lindsay, Ontario, save and except those of the rank of manager and those above the rank of manager." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**1873-76-R:** Canadian Union of Operating Engineers (Applicant) v. Olympia & York Developments Limited (Respondent).

Unit: "all employees of the respondent at 480 University Avenue, Toronto, save and except assistant superintendent, persons above the rank of assistant superintendent, office staff, persons regularly employed for not more than 24 hours per week and students hired for the school vacation period." (7 employees in the unit).

**1887-76-R:** Amalgamated Clothing and Textile Workers Union Toronto Joint Board (Applicant) v. Levi Strauss of Canada, Inc. (Respondent).

Unit: "all employees of the respondent located at 41 Brockley Drive, Hamilton, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, instructors, designers, sales and office staff, maintenance, quality auditors, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (81 employees in the unit). (*Having regards to the agreement of the parties*).

**1890-76-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 1304, 2480, 2482, 1747, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Barwood Sales (Ontario) Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1900-76-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Christie, Brown & Company Limited Biscuit Division (Respondent).

Unit: "all office employees of the respondent at 1775 Sismet Road, Mississauga, save and except office manager, persons above the rank of office manager and sales staff." (14 employees in the unit).



**1901-76-R:** Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Harkema Forwarders Limited (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit: "all pool car dock material handlers employed by the Respondent at its pool car dock in Brampton, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, students employed during the school vacation period, persons regularly employed for not more than 24 hours per week and persons covered by a subsisting Collective Agreement between the Respondent and Brampton Truck Drivers Association, Local No. 54, affiliated with the Christian Labour Association of Canada." (24 employees in the unit).

**1921-76-R:** The Hotel and Club Employees' Union, Local 299, Toronto, Ontario, affiliated with The Hotel and Restaurant Employees' and Bartenders' International Union (Applicant) v. Holiday Inn, Toronto-East of the Commonwealth Holiday Inns of Canada Limited (Respondent).

Unit: "all employees of the respondent at the Holiday Inn of Toronto-East of the Commonwealth Holiday Inns of Canada Limited, Warden Avenue & Hwy. 401, Scarborough, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, (including front desk clerks, front desk cashiers, payroll clerks, accounting clerks, audit department staff, secretaries), security staff (including timekeepers) and persons regularly employed for not more than twenty-four hours per week." (74 employees in the unit). (*Having regard to the agreement of the parties*).

**1922-76-R:** Labourers International Union of North America Local 491 (Applicant) v. Timmins Engineered Homes Limited (Respondent).

Unit: "all construction labourers employed by the respondent on construction sites out of plant within a fifty-mile radius of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (65 employees in the unit). (*Having regard to the agreement of the parties*).

**1937-76-R:** Service Employees Union, Local 210 (Applicant) v. Saugeen Memorial Hospital (Respondent).

Unit: "all employees of the Saugeen Memorial Hospital in Southampton, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, technical personnel, supervisors, persons above the rank of supervisor, office and clerical staff and persons covered by subsisting collective agreements." (10 employees in the unit).

**1949-76-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Terminal Insulation Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1951-76-R:** United Garment Workers of America (Applicant) v. Buckeye Peerless Textile Products Co., Limited (Respondent).

Unit: "all employees of the respondent at its plant and warehouse in Metropolitan Toronto, save and except foremen and foreladies, those above the rank of foreman and forelady, office staff, sales staff, and students employed during the school vacation period." (65 employees in the unit).

**1954-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. A. C. Khan Janitorial Services Ltd. (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance of Grandview Apartments, Downsview, Ontario, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (2 employees in the unit). (*Having regard to the agreement of the parties*).

**1957-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. A. C. Khan Janitorial Services Ltd. (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at Caravelle Apartments, 25 Fisherville Rd., Willowdale, Ontario, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (2 employees in the unit). (*Having regard to the agreement of the parties*).

**1963-76-R:** Ontario Public Service Employees Union (Applicant) v. The Corporation of the Town of Midland (Respondent).

Unit: "all office, clerical and technical employees of the respondent in the Town of Midland, save and except the Confidential Secretary to the Clerk, the Confidential Secretary to the Commissioner of Works, the Superintendent of Works, the Public Works Foreman, the Engineering Technologist and those above the rank of Commissioner of Works, Superintendent of Works, Public Works Foreman and Engineering Technologist." (19 employees in the unit). (*Having regard to the agreement of the parties*).

**1964-76-R** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 1747, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Paul Carruthers Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**1970-76-R:** Teamsters Local Union No. 419 Affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lousana Holdings Ltd., carrying on business under the firm name of Specialty Produce Co. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school summer vacation period." (4 employees in the unit).

**1975-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Index Investments Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**1976-76-R:** Canadian Union of Public Employees (Applicant) v. The Canadian Hearing Society (Respondent).

Unit: "all office, clerical and technical employees of the respondent in Toronto, save and except Executive Director, Secretary to Executive Director and Financial Administrator." (28 employees in the unit). (*Having regard to the agreement of the parties*).

**1984-76-R:** Laundry, Dry Cleaning & Dye House Workers' International Union, Local 351 (Applicant) v. Work Wear Corporation of Canada Ltd. (Respondent).

Unit: "all employees of the respondent in Waterloo, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, stationary engineers and boilerman, persons regularly employed for not more than twenty-four hours per week. students employed during the school vacation period and employees covered by a collective agreement between the respondent and Teamsters Local 847 dated the seventh day of January 1975." (29 employees in the unit). (*Having regard to the agreement of the parties*).

**1993-76-E:** Labourers' International Union of North America, Local 527 (Applicant) v. B.D.L. Contractors Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**1999-76-R** Labourers' International Union of North America, Local 183 (Applicant) v. Valle Forming Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all construction labourers in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

**2002-76-R:** Canadian Union of Public Employees (Applicant) v. Ajax and Pickering General Hospital (Respondent).

Unit: "all employees of the respondent in Ajax-Pickering regularly employed for not more than twenty-four hours per week, save and except Medical Staff, Graduate Nursing Staff, Undergraduate Nurses, Graduate Pharmacists, Undergraduate Pharmacists, Graduate Dietitians, Undergraduate Dietitians, Student Dietitians, Supervisors, persons above the rank of Supervisor, Office and Clerical employees." (85 employees in the unit). (*Having regard to the agreement of the parties*).

**2007-76-R:** Labours' International Union of North America, Local 183 (Applicant) v. Northdown Homes (Meadowvale) Inc. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**2008-76-R:** United Steelworkers of America (Applicant) v. International Mill Service (Respondent).



Unit: "all employees of the respondent in Whitby, save and except foremen, persons above the rank of foreman and office and sales staff." (10 employees in the unit). (*Having regard to the agreement of the parties*).

**2012-76-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800 (Applicant) v. Harry Ruddick Company Inc. (Respondent).

Unit: "all plumbers, plumbers' apprentices, steamfitters, steamfitters' apprentices, gas fitters and gas fitters' apprentices in the employ of the respondent within a fifty mile radius of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*clarity note* – see Report of full decision [1977] OLRB Rep. March).

**2014-76-R:** Service Employees Union, Local 204 (Applicant) v. The Brantford General Hospital (Respondent).

Unit: "all office and clerical employees of The Brantford General Hospital, in the City of Brantford, Ontario, save and except the Secretary to the Administrator, Secretary to the Assistant Administrator – Nursing Services, Secretary to the Assistant Administrator – Medical Services, Senior Clerk (Personnel), Payroll Assistant, Staffing Clerk (Nursing Services), Supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week, students employed during vacation periods, employees covered by existing collective agreements and certificates of the Board." (79 employees in the unit). (*Having regard to the agreement of the parties*).

**2015-76-R:** International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers Local Union No. 91 (Applicant) v. Chalut Transport (1974) Inc. (Respondent).

Unit: "all employees of the respondent working at Ottawa, save and except foremen, those above the rank of foreman, sales and office staff." (3 employees in the unit).

**2030-76-R:** Kraus Carpet Employee Association (Applicant) v. Chrome Print Limited (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Waterloo, save and except assistant foremen, persons above the rank of assistant foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (27 employees in the unit) (*Having regard to the agreement of the parties*).

**2044-76-R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Regional Municipality of Haldimand-Norfolk (Norview Home For The Aged) (Respondent).

Unit: "all employees of Norview Home For The Aged at Simcoe regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered nurses, office staff, and all persons covered by a subsisting collective agreement between the applicant and the respondent." (17 employees in the unit).

**2050-76-R:** Laborers' International Union of North America, Local 493 (Applicant) v. The Corporation of the Townships of Cosby, Mason and Martland, Respondent v. Group of Employees (Objectors).

Unit: "All employees of the respondent working within the Townships of Cosby, Mason and Martland, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in the unit). (*Having regard to the agreement of the parties*).

**2051-76-R:** United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Express Plastic Containers Limited (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of York save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (21 employees in the unit). (*Having regard to the agreement of the parties*).

**2067-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Consolidated Building Corporation Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at The Masters – 284, 288, 296 and 300 Mill Road, Etobicoke including Recreation Centre, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff, and students employed during the school vacation periods." (7 employees in the unit). (*Having regard to the agreement of the parties*).

**2073-76-R:** United Steelworkers of America (Applicant) v. Pre-Mec Sales & Service (Ottawa) Ltd. (Respondent).

Unit: "all employees of the respondent working at Ottawa, save and except foremen, persons above the rank of foreman, office and sales staff." (14 employees in the unit).

**2075-76-R:** Canadian Union of Public Employees (Applicant) v. Dufferin County Board of Education (Respondent).

Unit: "all employees of the Dufferin County Board of Education regularly employed for not more than 24 hours per week and students employed during the school vacation period, engaged in maintenance services and plant operations, save and except supervisors and persons above the rank of supervisor and office staff." (5 employees in the unit).

**2085-76-R:** International Union of Operating Engineers, Local 793 (Applicant) v. V. B. Cook Co. Limited (Respondent).

Unit: "all employees of the respondent working in the District of Thunder Bay as instrumentmen, rodmen, chainmen and Party Chief, save and except Field Engineers and persons above the rank of Field Engineer." (4 employees in the unit).

**2093-76-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Paul Carruthers Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working formen." (11 employees in the unit).

**2132-76-R:** Labourers' Internation Union of North America, Local 183 (Applicant) v. Dabosa Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

### Applications Certified Subsequent to Pre-Hearing Vote

**1253-76-R:** Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Halton (Respondent).

Voting Constituency #2: "All employees regularly employed for not more than 24 hours per week and students employed for the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate nurses, undergraduate nurses, graduate dieticians, student dieticians, office, clerical and technical staff." (59 employees).

Number of names of persons on list as originally prepared by employer		52
Number of persons who cast ballots	29	
Number of ballots marked in favour of applicant	18	
Number of ballots marked against applicant	11	

(Bargaining Unit #1 – See Certification Dismissed Subsequent to Pre-Hearing Vote). (Certified).

**1292-76-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Thames Valley Beverages Limited (Respondent).

Unit: "all office employees of the respondent at Hamilton, save and except the office manager, persons above the rank of office manager, the Secretary to the Executive Vice President, foremen and sales supervisors." (4 employees in the unit).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	1	

**1783-76-R:** Warehousemen and Miscellaneous Drivers Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Consumers Distributing Company Limited (Respondent) v. Oil & Gas Technicians, Service, Domestic and General Workers Union, Local 1267, L.I.U.N.A. (Intervener).

Unit: "all employees of the respondent working at or out of the Distribution Centre at 6700 Northwest Drive, Mississauga, Ontario and the satellite warehouses of the aforesaid distribution centre, save and except foremen, persons above the rank of foreman, office and sales staff, seasonal employees, students and persons regularly employed for not more than twenty-four (24) hours per week." (244 employees in the unit). (*Having regard to the agreement of the parties*).



Number of names of persons on revised voters' list		195
Number of persons who cast ballots	201	
Number of segregated ballots cast by persons who names appear on voters' (See appendix A)	32	
Number of segregated ballots cast by persons whose names do not appear on voters' list (see appendix B)	19	
<i>Ballot Box Sealed</i> K8		

**1799-76-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Lee Gasket Industries Inc. (Respondent).

Unit: "all employees of the Respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (75 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		72
Number of persons who cast ballots	65	
Number of ballots marked in favour of applicant	44	
Number of ballots marked against applicant	21	

**1850-76-R:** Canadian Paperworkers Union (Applicant) v. Reed Decorative Products Ltd. (Respondent) v. Printing Specialities and Paper Products Union, Local 466 (Intervener).

Unit: "all employees of the Company save and except foremen and foreladies, persons above the rank of foremen, office staff, sales staff, factory clerks, artists, laboratory technicians and summer students." (298 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		302
Number of persons who cast ballots	283	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	195	
Number of ballots marked in favour of intervener	85	

**1876-76-R:** Canadian Chemical Workers Union (Applicant) v. Canadian Johns-Manville Co., Limited (Respondent) v. International Chemical Workers Union and its Local 346 (Intervener).

Unit: "all employees of the Company at its plant at Port Union, Ontario, save and except office staff (both General Office and Factory Offices), guards, stationary engineers, Power House firemen, watchmen, foremen and persons above the rank of foreman." (540 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		522
Number of persons who cast ballots	432	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	358	
Number of ballots marked in favour of intervener	73	

## APPLICATIONS FOR DECLARATION DISMISSED

### No vote Conducted

**1050-76-R:** Canadian Union of Public Employees (Applicant) v. The Windsor Public Library Board (Respondent) v. Group of Employees (Objectors).

- and -

0468-76-R: Canadian Union of Public Employees (Applicant) v. The Windsor Public Library Board (Respondent). (214 employees).

**1547-76-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 306 (Applicant) v. Beatrice Foods (Ontario) Limited Lakeview Dairy Division (Respondent) v. Group of Employees (Objectors). (55 employees).

**1583-76-R:** Labourers' International Union of North America, Local 527 (Applicant) v. Cerquozzi Construction Company Limited (Respondent). (3 employees).

**1597-76-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tantalus Construction Company Limited (Respondent). (3 employees).

**1730-76-R:** Laborers' International Union of North America, Local 493 (Applicant) v. Municipality of Casimir, Jennings & Appleby (Respondent). (7 employees).

### Certification Dismissed Subsequent to Pre-Hearing Vote

**1253-76-R:** Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Halton (Respondent).

Voting Constituency #1: "All employees of the respondent in voting constituency #2 employed for not more than 24 hours per week and students employed for the school vacation, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate nurses, undergraduate nurses, graduate dietitians, student dietitians, office, clerical and technical staff." (141 employees)

Number of names of persons on revised voters' list	212
Number of persons who cast ballots	189
Ballots segregated and not counted	2
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	90
Number of ballots marked against applicant	93

(Bargaining Unit #2 - See Application Certified Subsequent to Pre-Hearing Vote). (Dismissed).

**1769-76-R:** United Electrical, Radio and Machine Workers of America (UE) Applicant) v. Basic Structure Steel Fabricators Limited (Respondent).

Voting Constituency: "All employees of the respondent in Welland, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (26 employees).

Number of names of persons on list as originally prepared by employer		21
Number of persons who cast ballots	20	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	10	

**1882-76-R:** Service Employees Union, Local 204 affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. Saga Canadian Management Services Ltd., (Respondent).

Voting Constituency: "All employees of the respondent, located at the St. George Campus of the University of Toronto, save and except supervisors, those above the rank of supervisor, dietitians, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (98 employees).

Number of names of persons on list as originally prepared by employer		50
Number of persons who cast ballots	47	
Number of ballots marked in favour of applicant	11	
Number of ballots marked against applicant	36	

### Certification Dismissed Subsequent to Post-Hearing Vote

**0944-76-R:** Amagamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C. (Applicant) v. Tend-R-Fresh Plant United Co-operatives of Ontario (Respondent).

Unit: "all employees of the respondent at Petersburg, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff and employees presently covered by a collective agreement between the respondent and the applicant signing on behalf of the Canadian Food and Allied Workers, Local P1116." (68 employees in the unit).

Number of names of persons on revised voters' list		58
Number of persons who cast ballots	55	
Number of ballots marked in favour of applicant	17	
Number of ballots marked against applicant	38	

**1147-76-R:** International Union of Operating Engineers, Local 793 (Applicant) v. D. L. Stephens Contracting (Niagara) Limited (Respondent) v. Christian Labours Association of Canada (Intervener).

Unit: "all employees of the respondent in the Regional Municipality of Niagara and the County of Haldimand, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in the unit).

Number of names of persons on voters' list		9
Number of persons who cast ballots	9	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	4	
Number of ballots marked in favour of intervener	4	



**1598-76-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Hawker Siddeley Canada Ltd., Forestry Equipment Division (Respondent).

Unit: "all employees of Hawker Siddeley Canada Ltd., Forestry Equipment Divisions, in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons covered by subsisting collective agreements between International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), Local 252." (8 employees in the unit).

Number of names of persons on list as originally prepared by employer		46
Number of persons who cast ballots	41	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	30	

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**1837-76-R:** The United Hatters, Cap and Millinery Workers International Union – Local 46 – C.L.C. (Applicant) v. Style-Rite Hat Co. (Respondent) v. Employees (Objectors). (6 employees).

**1866-76-R:** United Brotherhood of Carpenters and Joiners of America Local Union 93 (Applicant) v. J. C. Sulphur Construction Ltd. (Respondent). (4 employees).

**1897-76-R:** Labourers' International Union of North America, Local 247 (Applicant) v. Sentinel Reliance Aluminum Products Limited (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers Local Union 765 (Intervener). (4 employees).

**1950-76-R:** Service Employees Union, Local 210 ((Applicant) v. Christian Care Centres of Leamington Limited carrying on business under the name of Leamington Nursing Home (Respondent). (44 employees).

**1979-76-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Frid Construction Company Ltd. (Respondent). (2 employees).

**1998-76-R:** Labourers' International Union of North America Local 247 (Applicant) v. The Miller Brothers Company (1962) Limited (Respondent). (65 employees).

**2009-76-R:** United Steelworkers of America (Applicant) v. Inglis Limited (Respondent). (65 employees).

**2016-76-R** The Employees' Association of Interline Furniture Limited (Applicant) v. Interline Furniture Limited (Respondent) v. International Woodworkers of America (Intervener). (60 employees).

**2031-76-R:** University of Guelph Food Service Employees Association (Applicant) v. The University of Guelph (Respondent). (286 employees).

**2083-76-R:** United Brotherhood of Carpenters & Joiners of America (Applicant) v. Engineered Structures and Components, Robintide Investments Limited, and Konvey Construction Company Limited (Respondents). (3 employees).

**2092-76-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Miller Bros. Company (1962) Limited (Respondent) v. Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 124 (Intervener). (3 employees).

**2128-76-R:** The Hotels, Clubs, Restaurants, Taverns, Employees' Union, Local 261 (Applicant) v. Winco Steak'n Burger Restaurants Limited (Respondent). (15 employees).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1692-76-R:** Richard Ratz, Cody Cizmar, Milton Polowick, Michael George, Patrick Huston, Richard Barrow, Richard Wilkes, Evelyn Stecyszyn, Heather Taylor (Applicants) v. The Office and Professional Employees' International Union Local 81 (Respondent) v. Huyck Environment Systems Limited (Intervener). (*Granted*).

Unit: "all employees of Huyck Environment Systems Limited at its office in Thunder Bay, Ontario save and except supervisors, persons above the rank of supervisor and one executive secretary to the management." (9 employees in the unit).

Number of names of persons on revised voters' list		7
Number of persons who cast ballots		7
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	7	

**1766-76-R:** Christine A. Ball (Applicant) v. The Canadian Union of Public Employees, Local 1 (Respondent) v. The Ontario Municipal Employees Retirement Board (Intervener). (*Granted*).

Unit: "all employees occupying the classifications listed below who are neither part-time nor temporary employees (as those terms are defined in Article 2.02 of the Collective agreement)." (40 employees in the unit).

Number of names of persons on list as originally prepared by employer		40
Number of persons who cast ballots		38
Number of ballots marked in favour of Respondent	5	
Number of ballots marked against Respondent	33	

**1767-76-R:** Michael Preston (Applicant) v. United Steelworkers of America, Local Union 14232 (Respondent). (*Dismissed*).

Unit: "all employees of Reichhold Chemicals Limited in the Municipality of Metropolitan Toronto, paid an hourly rate, save and except persons having authority to employ, suspend or discharge employees or persons employed in a confidential capacity." (40 employees in the unit).

Number of names of persons on revised voters' list		41
Number of persons who cast ballots		39
Number of ballots marked in favour of Respondent	36	
Number of ballots marked against Respondent	3	

**1797-76-R:** Peter George, Soen T. Yap, Keith E. Jenken, Jack Jeffries, Doug Waddell, Alan G. Morris, Patricia Kirby, James Kerr, Clinton Darell O'Donnell, Jon C. Kiteley, John F. McNamee, James N. Graham, and Brenda M. La Grandeur (Applicants) v. United Steelworkers of America, Bargaining Unit # One (Respondent) v. Union Miniere Explorations and Mining Corporation Limited (Intervener). (32 employees). (*Withdrawn*)

**1846-76-R:** Wayne Gray, Ken McGibbon, Jean Jamieson, Beatrice Moore, Alda Viveiros, William Blackburn, Vincent St. Hilaire, Doug Mainprize, John King, Manuel Maiato (Applicants) v. Labourers International Union, Oil and Gas Technicians, Service, Domestic and General Workers Union Local 1267 (Respondent). (*Granted*).

Unit: "all employees of Simmons Limited located at 15 Bramalea Road, Bramalea Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (238 employees in the unit).

Number of names of persons on revised voters' list		185
Number of persons who cast ballots	171	
Number of spoiled ballots	4	
Number of ballots marked in favour respondent	32	
Number of ballots marked against respondent	135	

**2006-76-R:** Helen Glaser (Applicant) v. Retail, Wholesale and Department Store Union, Local # 1002, A.F.L. C.I.O. C.L.C. (Respondent). (7 employees). (*Granted*).

## APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

**1933-76-R:** United Steelworkers of America (Applicant) v. Disston (Canada) Limited (Respondent). (*Granted*).

**2068-76-R:** Shopmen's Local Union 834 of the International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. De Laval Turbine of Canada Ltd. (Respondent). (*Granted*).

**2069-76-R:** Shopmen's Local Union 834 of the International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. Abel Metal Products (1971) Ltd. (Respondent). (*Granted*).

**2070-76-R:** Shopmen's Local Union 835 of the International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. Kawneer Company Canada Limited (Respondent). (*Granted*).

## APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

**1298-76-U:** Liquid Carbonic Canada Ltd. (Applicant) v. L. Anderson, et al, (see Schedule "A" attached) (Respondents). (*Directed*).

**1971-76-U:** Arthur G. McKee and Company of Canada Limited (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers Lodge 128, Victor



Champaign, Peter Boyko, Manuel Correia, Vincente Ealero, Armando Engeheiro, Fred Goodine, A. Gunning, Duncan Hand, Alex Kara, Vernon Lush, Andrew McAdam, John McDonald, Maurice McMahon, Remi Maisonneuve, James Murphy, Jean Normandeau, John Paulmert, S. Petronski, Steven Raj, Victor Rodrigues, Gordon Schneider, Bob Slyn, Earl Shortell and Peter Vavroutsos (Respondents). (*Granted*).

**1983-76-U:** Croven Limited (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1090 (Respondent). (*Dismissed*).

**2025-76-U:** Ferranti-Packard Limited (Applicant) v. United Steelworkers of America, Local 5788, and J.C. Adams et al (Respondents). (*Withdrawn*).

**2039-76-U:** Nortown Refrigeration Ltd. (Applicant) v. Refrigeration Workers of Ontario, Local 787 and Alvin Goodman and others (Respondents). (*Withdrawn*).

**2042-76-U:** Seebach & Sons (1969) Ltd. (Applicant) v. Sheet Metal Workers Union, Local 30, and Jose Pereira and others (Respondents). (*Withdrawn*).

**2107-76-U:** The Lummus Company Canada Limited (Applicant) v. Basil Ware, et al (Respondents). (*Withdrawn*).

## APPLICATIONS FOR CONSENT TO PROSECUTE

**1857-76-U:** Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation #165 and Ray Hassman (Respondents). (*Withdrawn*).

**1912-76-U:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. George Nieman Limited and George Nieman (Respondents). (*Withdrawn*).

## COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

**1669-75-U:** Mr. Derek Woodman (Complainant) v. United Auto Workers Local 707 (Respondent). (*Dismissed*).

**0509-76-U:** Labourers' International Union of North America, Local 1089 (Complainant) v. T.E.L. Council of Trade Unions (Respondent) v. The Labour Bureau of the Ontario Road Builders Association and the Ontario Sewer and Water Main Contractors Association (Intervener). (*Withdrawn*).

**1394-76-U:** Association of General Studies Teachers in Hebrew Day Schools (Complainant) v. Associated Hebrew Academy of Toronto (Respondent). (*Withdrawn*).

**1444-76-U:** Walter Lumsden (Complainant) v. Coca-Cola Ltd. (Respondent). (*Withdrawn*).

**1558-76-U:** Maurice O'Connell (Complainant) v. Northern Construction Workers Union (Respondent). (*Dismissed*).

**1564-76-U:** The United Steelworkers of America, Local 4487 (Complainant) v. Inglis Limited (Respondent).

- and -

**1565-76-U:** The United Steelworkers of America, Local 2900 (Complainant) v. Inglis Limited (Respondent). (*Dismissed*).

**1594-76-U:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), Local 251 (Complainant) v. Libby & McNeil & Libby of Canada Limited (Respondent).

- and -

**1596-76-U:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), Local 35 (Complainant) v. Libby McNeill & Libby of Canada, Limited (Respondent). (*Withdrawn*).

**1664-76-U:** Shafickool Mohammed (Complainant) v. Local 439, United Automobile Workers (United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W.)(Respondent) v. Massey-Ferguson Industries Limited and Massey Ferguson Limited (Respondent). (*Dismissed*).

**1687-76-U:** Leonard Murphy (Complainant) v. International Printing and Graphic Communications Union, Local 482 (Respondent). (*Granted*).

**1966-76-U:** International Beverage Dispensers' and Bartenders' Union, Local 280 (Complainant) v. Egerton's Restaurant (Respondent). (*Withdrawn*).

**1709-76-U:** Vincent Ward Ricketts (Complainant) v. United Electrical and Machine Workers of America (Respondent). (*Withdrawn*).

**1733-76-U:** Canadian Union of Operating Engineers (Complainant) v. The Shaver Hospital for Chest Diseases (Respondent). (*Withdrawn*).

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**1738-76-U:** Donna Hewitt (Employee) (Complainant) v. Employees Committee representing employees of Bauer Bros. Company (Canada) Brantford, Ontario (Respondent). (*Dismissed*).

**1758-76-U:** George Zebrowski (Complainant) v. Graphic Arts International Union, Local 517 and Lawson and Jones Limited (Respondents). (*Dismissed*).

**1777-76-U:** Daniel Joseph Steele (Complainant) v. International Labourers Union (Local 506) (Respondent). (*Dismissed*).

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**1865-76-U:** Maria Candida Arcanjo (Complainant) v. Amalgamated Clothing and Textile Workers of America (Respondent). (*Dismissed*).

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**1886-76-U:** Guy Lafond (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), Local 1941 U.A.W. (Respondents). (*Withdrawn*).

**1894-76-U:** United Rubber, Cork, Linoleum and Plastic Workers of America AFL CIO CLC (Complainant) v. Hemisphere International Mfg. Co. (Respondent). (*Withdrawn*).

**1910-76-U:** Local Union 1687 International Brotherhood of Electrical Workers (Complainant) v. M.G. Burke Investments Limited (Respondent). (*Withdrawn*).

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**1936-76-U:** Douglas Martin (Complainant) v. Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351 and Work Wear Corporation of Canada Ltd. (Windsor, Ontario) (Respondents). (*Withdrawn*).

**1938-76-U:** International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union. A.F.L. – C.I.O. – C.L.C. (Complainant) v. The Seaway Hotels (Ontario) Limited (Respondent). (*Withdrawn*).



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**A Monthly Series of Decisions from the  
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**Cited [1977] OLRB REP.**

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**Employee – Reference under Colleges Collective Bargaining Act – Whether development officers excluded from scope of Act – Whether development officers “managerial”.**

**BEFORE:** D.H. Kates, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

**APPEARANCES:** *S.T. Goudge and A. Millard for the applicant; F.G. Hamilton and H. Filchrist for the respondents.*

**DECISION OF THE BOARD;** May 9, 1977.

1. This is a reference filed pursuant to section 82 of the *Colleges Collective Bargaining Act*, 1975 (hereinafter referred to as “Bill 108” where the employment status of persons classified by the respondent employers as “Development Officers” was raised in issue. There are approximately twenty-two persons affected by the application and who are presently employed by numerous colleges of applied arts and technology throughout the Province. By agreement of the parties the instant reference is a consolidated proceeding whereby each of the persons disputed is to be treated on an individual basis. Section 82 reads as follows:

“82. If, in the course of bargaining for an agreement or during the period of operation of an agreement, a question arises as to whether a person is an employee, including a question as to whether a person employed as a chairman, department head, director, foreman or supervisor is employed in a managerial or confidential capacity pursuant to clause 1 of section 1 and the schedules, the question may be referred to the Ontario Labour Relations Board and its decision thereon is final and binding for all purposes.”

2. Pursuant to the difficulties encountered by the Labour Relations Officer in adopting procedures for examining each development officer the parties agreed to the submission of an interim report after the completion of four interviews. It was contemplated that the Board's determination with respect to these persons may very well resolve the employment status of the balance of the disputed officers. It is to be noted that the Board's rulings are without prejudice to a party's position with respect to its view of the status of those persons who were not examined.

3. The background circumstances precipitating the reference are of some relevance to the disposition of the issues and therefore ought to be reviewed. Up until September 1, 1975 the development officer was employed as a civil servant assigned to The Ministry of Colleges and Universities. At the Ministry the primary duty of the development officer was to develop, approve and monitor training programmes financially sponsored by the Federal Government's Department of Manpower. On September 1, 1975 these development officers were offered employment with the respondent community colleges where to all intents and purposes they were assigned the same tasks with respect to manpower training programmes. Their increased duties and responsibilities at the community colleges will be outlined later in the decision.

4. While employed by the Ministry of Colleges and Universities these employees were represented for collective bargaining purposes by the applicant trade union. Those bargaining rights were governed by the *Crown Employees Collective Bargaining Act*, 1972 and the employees affected by the instant reference were assigned to a bargaining unit prescribed by that statute. It is of some relevance to note that under the *Crown Employees Collective Bargaining Act* work stoppages are prohibited as an instrument to resolving impasses reached in the negotiation of a collective agreement. Prior to the transfer of these employees to the respondent Community Colleges the *Colleges Collective Bargaining Act*, 1975, on July 18, 1975, received Royal Assent. Bill 108 is intended to "provide procedures for making and renewing of agreements between The Ontario Council of Regents on behalf of Boards of Governors of the Colleges of Applied Arts and Technology and employee organizations that represent the persons employed as academic or support staff." One significant departure in Bill 108 that, needless to say, underlies the respondents' concerns with respect to the employment status of the development officer is the absence of the strike prohibition as a means of resolving negotiation disputes. In any event once the development officer was formally engaged by the respondent college he has been denied access to collective bargaining as perceived by Bill 108. Whereas under the *Crown Employees Collective Bargaining Act*, 1972, the development officer was treated as an employee for purposes of that Act, the employer has now argued he has since been deprived of like benefits under Bill 108. At this point it is of some significance to compare the relevant terms of these statutes:

The *Crown Employees Collective Bargaining Act*, 1972 defines "employee" as follows:

S.1-(1) In this Act,

- (g) "employee" means a Crown employee as defined in *The Public Service Act* but does not include,
  - (i) a member of the Ontario Provincial Police Force,
  - (ii) an employee of a college of applied arts and technology,
  - (iii) a person employed in a managerial or confidential capacity,
  - (iv) a person who is a member of the architectural, dental, engineering, legal or medical profession entitled to practice in Ontario and employed in a professional capacity,
  - (v) a person who is employed on a casual or temporary basis unless he has been so employed continuously for a period of six months or more,
  - (vi) a person engaged under contract in a professional or other special capacity, or for a project of a non-recurring kind, or on a temporary work assignment arranged by the Civil Service Commission in accordance with its program for providing temporary help,
  - (vii) a person engaged and employed outside Ontario, or



- (viii) a person employed in the office of the Provincial Auditor or of the Speaker, Deputy Speaker or Clerk of the Assembly;

The *Colleges Collective Bargaining Act* defines “employee” as follows:

S.1-(1) In this Act and in the Schedules,

- (f) “employee” means a person employed by a *board of governors of a college of applied arts and technology* in a position or classification that is within the academic staff bargaining unit or the support staff bargaining unit set out in Schedules 1 and 2.

## SCHEDULE 1

The academic staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology who are employed as teachers, *counsellors* or librarians but does not include,

- (i) chairmen,
- (ii) department heads,
- (iii) directors,
- (iv) persons above the rank of chairman, department head or director,
- (v) other persons employed in a managerial or confidential capacity,
- (vi) teachers who teach for six hours or less per week,
- (vii) counsellors and librarians employed on a part-time basis,
- (viii) teachers, counsellors or librarians who are appointed for one or more sessions and who are employed for not more than twelve months in any twenty-four month period,
- (ix) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity, or
- (x) a person engaged and employed outside Ontario.

## SCHEDULE 2

The support staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology employed in positions or classifications in the office, clerical, *technical*, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff but does not include,

- (i) foremen,
- (ii) supervisors,
- (iii) persons above the rank of foreman or supervisor,
- (iv) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college of applied arts and technology or of a constituent campus of a college of applied arts and technology including persons employed in clerical, stenographic or secretarial positions,
- (v) other persons employed in a managerial or confidential capacity,
- (vi) persons regularly employed for not more than twenty-four hours a week,
- (vii) students employed in a co-operative educational training program undertaken with a school, college or university,
- (viii) a graduate of a college of applied arts and technology during the period of twelve months immediately following completion of a course of study or instruction at the college by the graduate if the employment of the graduate is associated with a certification, registration or other licensing requirement;
- (ix) a person engaged for a project of a non-recurring kind,
- (x) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity, or
- (xi) a person engaged and employed outside Ontario.

The *Crown Employees Collective Bargaining Act* defines "persons employed in a managerial or confidential capacity" in this manner:

(m) "person employed in a managerial or confidential capacity" means a person who,

- (i) is employed in a position confidential to the Lieutenant Governor, a Minister of the Crown, a judge of a provincial court, the deputy head of a ministry of the Government of Ontario or the chief executive officer of any agency of the Crown,

- (ii) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the Government or an agency of the Crown or in the formulation of budgets of the Government or an agency of the Crown,
- (iii) spends a significant portion of his time in the supervision of employees,
- (iv) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
- (v) adjudicates or determines claims for compensation which are made pursuant to the provisions of any statute,
- (vi) is employed in a position confidential to any person described in subclause i, ii, iii, iv or v,
- (vii) is employed in a confidential capacity in matters relating to employee relations including a person employed in a clerical, stenographic or secretarial position in the Civil Service Commission or in a personnel office in a ministry or agency of the Government of Ontario, or,
- (viii) is not otherwise described in subclauses i to vii but who in the opinion of the Tribunal should not be included in a bargaining unit by reason of his duties and responsibilities to the employer;

The *Colleges Collective Bargaining Act* defines "persons employed in a managerial and confidential capacity" as follows:

S.1.(I) (1) "person employed in a managerial or confidential capacity" means a person who,

- (i) is involved in the formulation or organization objectives and policy in relation to the development and administration of programs of the employer or in the formulation of budgets of the employer,
- (ii) spends a significant portion of his time in the supervision of employees,
- (iii) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
- (iv) is employed in a position confidential to any person described in subclause i, ii or iii,



- (v) is employed in a confidential capacity in matters relating to employee relations,
- (vi) is not otherwise described in subclauses i to v but who, in the opinion of the Ontario Labour Relations Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer;

5. The respondents, it should be made clear, submit that the exclusion of the development officer from operation of Bill 108 ought to be concluded for two reasons. Firstly, it is submitted that he is employed in a managerial or confidential capacity as defined by that act and is therefore excluded from the bargaining units described in Schedules 1 and 2 of the act. And, secondly, if not alternatively, it is argued that the development officer because he falls into neither the academic nor support categories contemplated by the unit descriptions attached as schedules to the act he cannot be deemed an "employee" as defined by that statute. The applicant trade union argues that the development officer is just as much an employee for purposes of Bill 108 as he was an employee entitled to collective representation under the *Crown Employees Collective Bargaining Act*. Moreover, the applicant argues that as an employee the development officer to the extent "he counsels" is a member of the academic bargaining unit contemplated in Schedule 1.

6. The Board has heretofore made some references to the development officer's duties while employed by the Ministry of Colleges and Universities and subsequently continued upon being engaged by the community colleges. In this capacity, the evidence establishes, the development officer is employed as "a consultant" to the Department of Manpower in adapting a training programme to the needs of the affected employees. This programme was referred to throughout the Labour Relations Officers' enquiry as the *Canada Manpower Industrial Training Programme (CMITP)*. The principal duties of the development officer with respect to CMITP was to make certain that the training programme proposed fell within the type of programme that Manpower, through its guidelines and regulations, is authorized to subsidize. In this respect the costs of the programme inclusive of a portion of the wages of the employees who were the beneficiaries of the programme are paid by the Federal Government. If the development officer could not recommend a proposed training programme then he would suggest the adoption of means by which the employer could become eligible. Once the programme is approved and the employer has contracted with the Department of Manpower to discharge the requirements of the training programme the development officer is required to supervise the project. In the event that the terms of the programme are not being adhered to the development officer is authorized to recommend adjustments to cure the shortcomings and failure to abide by his recommendations can result in cancellation of the programme. It is clear that one of the main functions performed by the development officer is to prevent the abuse by an employer of Federal subsidies designed to upgrade the skills of employees through approved training programmes. These programmes in the main are "in plant" where instruction is provided by the employer.

7. Once employed by the community college the development officer's duties were broadened to include the marketing and supervision of other training programmes designed to increase the productivity of the employer's operations by upgrading the skills of its employees. One of these programmes was described as "The Training in Business and

Industry" programme (TIBI). This programme is partially funded by the company whose employees are to be beneficiaries of the course work and by the Ministry of Colleges and Universities. Indeed, it was indicated that the Ministry funded 66 % of the costs. The objective of this programme was to increase the skills of employees engaged in a particular industry with respect to certain facets of its operations. Here the development officer would meet with various and sundry employers and employer's associations with a view to designing a programme that suited their needs. Once a programme is designed and accepted by the employer, then a contract is entered into whereby the employer agreed to discharge the specific terms of the arrangement. The development officer thereupon would engage the instructors required to teach the programme, furnish facilities (if not on the employer's premises) and other material or equipment necessary to the success of the programme. In this regard the development officer within prescribed limits is authorized and responsible for making these expenditures. There is no question that the development officer, through his dealings, binds the respondent college to the terms and conditions of any negotiated arrangement. These expenditures run the gamut of negotiating the instructor's fee, renting facilities and purchasing equipment. The duration of these programmes and the extent of the instruction as opposed to "on the job" training varies with the nature of the course. The Board was advised for reasons best attributable to government attrition that "the TIBI programme is being phased out with the objective of replacing it with what are described as 'total cost recovery' programmes."

8. One such programme was described as "the Management Development Programme (MDP). The objective of this programme is to increase the capabilities of supervisory personnel with respect to their duties and responsibilities with the employer's production staff. Administrative skills on the periphery of personnel relations are also a part of the programmes' design. Quite clearly in dealing with "total recovery programmes such as 'the MDP' " the development officer's principal duties are to market a product whose main objective is to increase the revenues of the college. In this context the development officer performs the duties of a salesman whose expertise as a consultant are applied to win the fancy of a company whose productivity will be enhanced by the specific training programme marketed by the officer. In this regard the college is in direct competition with private consulting firms who in many respects may market the same product. Indeed, the creation of the community college was said to be designed with a view to upgrading the workforce of employers whose objectives may be facilitated by the training programmes arranged by the development officer.

9. On reviewing the purposes of these training programmes which to all intents and purposes are administered through the vehicle of the community college the conclusion is readily made that the development officer is integral to their success. The development officer, whether by academic training or practical experience, must manifest skills in a variety of the facets of what constitute the achievement of the programmes' purpose. He must be aware of sundry occupational skills that are part and parcel of an employer's undertaking in order to analyse the needs of the company for purposes of designing and recommending a particular training programme. He must exercise the astuteness of an investigator and the incisiveness of a businessman in monitoring and negotiating the terms of a contract assumed by the employer. He must relate the human needs contemplated by the government subsidy to the realities of the employer's situation in assessing the efficacy of a particular programme. He must communicate in practical, pragmatic terms with persons whom he must convince require the benefits of a particular training programme. He must limit the ex-



penditures of such programmes so as not to incur a liability to the college. Indeed, from the negotiation of the costs of a programme with the employer to assuaging the sensibilities of the employees' trade union representative, he must conduct himself with diplomacy and tact. In short, the "development officer" is clearly a person who by virtue of his duties and responsibilities is a multi-talented individual whose expertise underlies the quality of the service offered by the community college.

10. During the course of the hearing the parties submitted representations on the subject of where the onus of proof lies in establishing their respective positions. The Board, in considering these representations has noted that the "development officer" prior to his employment with the respondents was entitled to collective bargaining rights under the *Crown Employees Collective Bargaining Act*, 1972. In comparing that legislation with Bill 108 the Board is of the view, having regard to the similarity of their terms with respect to the definition of the managerial and confidential employee, that the employer ought to be put to the task of showing cause as to why the "development officer" ought to be denied representative rights for the reasons cited by the respondents' counsel in paragraph 5 herein. Whether the Board ought in all like cases that fall under Bill 108 apply the general principle cited by the Board in *The Ajax-Pickering Hospital* case, [1969], OLRB MR. 1283 (Feb.) must await the situation where such a conclusion may be fully justified by the circumstances.

11. The Board notes that by the mere delineation of itemized criteria descriptive of the managerial person under section 1(1)(1) of Bill 108 the Legislature intended that our discretion, otherwise unfettered under section 1(3)(b) of *The Labour Relations Act*, be circumscribed by the exact terms thereof. In other words, a situation may very well be contrived whereby in the application of its criteria under *The Labour Relations Act* to the totality of an employees' responsibilities the Board would determine a person to be an employee for purposes of that Act. But we would be prohibited from making the same finding under Bill 108 because of the exercise of a prescribed managerial function indicated under categories (i) to (v) of section 1(1)(1) of Bill 108. The Board, however, is not convinced that the narrowing of our discretion necessarily renders irrelevant or superfluous the policy consideration and case law demonstrative of those considerations with respect to resolving the managerial dilemma under section 1(3)(b) of *The Labour Relations Act*. In category (vi) of section 1(1)(1) of Bill 108 the Legislature directs that any person *who in the opinion of the Ontario Labour Relations Board* should not be included in a bargaining unit by reason of his duties and responsibilities to the employer should be treated as managerial, or confidential, as the case may be. In other words, except for the specificity of section 1(1)(1) in particularizing areas where the exercise of managerial functions are to be treated as conclusive our discretion remains as though it were exercised under the provisions of *The Labour Relations Act*. Indeed, Bill 108 contemplates that in the absence of the exercise of these specific areas of managerial import by a person whose employment status is disputed the Board may, having regard to our expertise in measuring the parameters of the managerial and/or confidential function, decide to exclude him for reasons that accord with established industrial relations norms.

12. In reviewing category (i) of section 1(1)(1) of Bill 108 the Board cannot conclude that the "development officer" in any way participates in formulation of organizational objectives and policy in relation to the development and administration of these training programmes. Rather, he is basically a consultant with respect to facets of industrial productivity whose skills are exploited by funding organizations who need his advice and counsel.



The setting of objectives and the development of policy are established by the various government and quasi-government organizations that are ultimately responsible for the success of the training programmes. This is not to say, however, that the experience and the expertise of the development officer will not be tapped by governmental officials who indeed rely on the information furnished by him. The Board was told that one purpose of the transfer of the development officer from the Ministry to the community college was because it increased his "effectiveness" by being closer to the community served by the programmes. Obviously persons responsible for adapting organizational objectives would be foolhardy in not consulting with the development officer. These advisory functions are often manifested by the appointment of the development officer to committees where the significance of various training programmes are weighed. Notwithstanding this degree of participation in the determination of organizational strategies and priorities in adopting the programmes that are ultimately marketed to the community served by the college, we can conceive no managerial function in the sense of ultimate responsibility in the formulation of the college's policy. The same may be said to apply to the formulation of budgets of the employer. In this regard the development officer in selling and marketing the training programmes may very well be in a position to provide first hand information with respect to the costs and expenditures of various training programmes. Indeed, his knowledge again may be exploited in predicting the likelihood of a profit by virtue of the adoption of one particular programme in deference to another. From this perspective he may be asked to sit in on decisions of the college where the apportionment and allocation of funds are to be channelled once the budget has been set. Indeed he may be indispensable in providing information to persons who are responsible for formulating budgets. It does not follow, however, that because the "development officer" is a useful source of information with respect to the formulation of budgets that he thereby becomes "involved" in the sense contemplated by Bill 108.

13. Save for Mr. Snowden who stated he was responsible for the hiring and supervision of another development officer engaged by his employer none of the other development officers interviewed stated that they had any supervisory interaction with employees of the respondents. The development officer may be required to negotiate a fee with a college instructor to teach a particular course in a training programme. But in the discharge of these negotiations and the supervision of his instruction the college instructor is acting in the capacity of an independent consultant. These are "extra functions" performed by the college instructor independent of his regular teaching responsibilities performed in the service of the college. Indeed, more often than not the instructors engaged by the development officer are consultants who have no relationship with the college whatsoever. In the isolated instance where a college instructor is engaged to teach a programme he is not for that specific purpose treated as "an employee" of the college. Counsel for the respondents failed to establish the contrary notwithstanding the Board's efforts to extend the respondents every opportunity for adducing such proof. Mr. Snowden testified that he sat on a committee where his advice was sought with respect to the hiring of a particular candidate for the position of Development Officer at The Georgian Community College in Barrie. The evidence is clear, however, that the chairman of that committee was ultimately responsible for his hiring and would, if Mr. Snowden's evaluation of his progress as an officer were to be negative, be responsible for his termination. The Board cannot conclude that Mr. Snowden's responsibilities in supervising the clerical and typing duties of the one office girl assigned to that department consume a significant portion of time devoted to his job duties and responsibilities. A more balanced view on this aspect of the case was presented by the development officers who worked for George Brown College in Toronto. They advised that they exercised no su-

pervisory functions over the pool of typists who were assigned the performance of clerical and secretarial duties on their behalf. As a result, with respect to both the alleged supervisory duties exercised over instructors of the college or in relation to the supervision of clerical employees engaged by the college the Board cannot conclude a significant portion of time is spent by the development officer in that capacity. Moreover the evidence does not indicate that the development officer processes employee grievances on behalf of the employer.

14. There was no allegation that the development officer was employed in a confidential capacity in matters relating to labour relations. There was the suggestion that because the development officer may have access to budgetary information, the trade secrets or formulae of client groups and may involve himself with the trade union representatives of employees who may become students of a training programme, he ought to be excluded because of the confidential nature of his duties and responsibilities. There was no suggestion that in the exercise of his routine duties the development officer is employed in a position where he is likely to embarrass or compromise the status of persons employed by the respondent in categories (i), (ii) or (iii) of section 1(1) of Bill 108. In other words, the development officer is not alleged to be employed in the nature of an executive assistant or executive secretary to any person who would otherwise be excluded because of his "managerial" duties and responsibilities. It seems that in absence of a direct functional and confidential connection with such a person the respondents are without grounds to request an employee's exclusion based on his purported access to classified information. In any event, the Board finds that mere exposure to the trade secrets of client groups or other such classified information would not justify the employee's exclusion from the bargaining unit. Surely, in the event of a violation of a confidence of this nature the employer would have cause for discipline, if not discharge. But in all other respects we are satisfied that exposure to confidential data of a corporate client's operations is such an integral part of the discharge of the development officer's duties and responsibilities that he inevitably would be expected to exercise utter discretion in the manner he puts such information to use. We would not hold, however, that the mere exposure to information of a delicate nature ought to justify his denial of trade union representation. (See, for example, *The Sheridan College of Applied Arts and Technology* case, [1976] OLRB Rep. Dec. at 853.) Finally, the evidence discloses that the training programme proposed by the company often may be in conflict with the employer's obligation under a collective agreement. This may entail discussion, negotiation and, indeed, mediation by the development officer with the employee's trade union representative. The Board cannot hold that any such discussions directly related to the rights of employees negotiated by their bargaining agent are confidential in nature. Surely the very opposite is the case. The trade union representative in fulfilling his duties and responsibilities may very well be entitled to be made part of the deliberations with respect to the training and upgrading of employees. The legitimate intervention of the trade union in the adoption by the employer of such training schemes undermines any suggestion that the contents of a particular type of training programme designed for employees engaged in a union shop is classified information. We are of the view that co-operation with the union representative, by inviting his participation, appears to be the more pragmatic approach to the adoption of an efficacious training course.

15. The employer in the last analysis argues that even if the development officer does not fall into any of the specific categories contemplated by Bill 108, the Board in its discretion ought to exclude him from the bargaining unit having regard to the totality of his duties



and responsibilities. The development officers agreed that their duties have been increased by virtue of their responsibilities not only for the CMITD but also for TIBI and MDP programmes. Nevertheless, they in a general sense viewed their new positions as a lateral transfer from their positions with the Ministry of Colleges and Universities (Dorothea Moss excepted.) In other words, their expertise as applied to the CMITP was intended to be applied in the same fundamental manner to the enhancement of the other programmes offered through the community college. Most stated that their primary function was the continuation of their responsibilities with respect to the CMITP programme. They were to be phased into additional programmes as time elapsed. The effect of this was to cause their job responsibilities to be allocated amongst a number of assigned programmes. In no way can it seriously be concluded, however, that these added responsibilities, admittedly requiring the expertise heretofore described, justifies designating these employees as managerial.

16. But the respondents argue that these employees, through their dealings with owners and managers of corporations in promoting and marketing these training programmes inherently create conflicts that can only be resolved by their exclusion from the bargaining unit. Indeed it is submitted that these persons, if not excluded, would be entitled under Bill 108 to engage in strike activity where that was prohibited while they were employed as public servants. The Board simply can find no connection between the effectiveness of the development officer's job performance with the client groups and his entitlement to the complete benefits of collective bargaining. If the respondents are saying that the negotiation of a contract with a client may be prejudiced by virtue of his having to deal with a development officer represented by a trade union (i.e., a non-managerial person) then such discrimination can only operate to the client's loss. A token comparison of Bill 108 and the *Crown Employees Collective Bargaining Act* with respect to their definitions of the managerial and confidential employee induces us to conclude that it was more the intention of the Legislature to expand the rights of employees of community colleges with respect to collective bargaining rather than to abridge their entitlement by a narrow construction of the managerial person. In short, we find that it was the Legislature's intention to extend the scope of remedies available to employees of community colleges that were otherwise unavailable to them as public servants. We have not been satisfied that the respondents have established a case for the exclusion of the development officer under the general category anticipated by item (iv) of section 1(1)(1) of Bill 108. The Board perceives no conflict in the effectiveness of the development officer in the discharge of his duties if conferred the rights of collective bargaining as anticipated by that statute.

17. The parties were in dispute on what schedule, if any, the development officer belonged if ruled to be non-managerial in his employment relationship with the respondent. The Board agrees with counsel for the respondents that the development officer does not counsel students of the college, although he clearly provides advice to the college with respect to the adoption of employee training programmes. The word "counsellor" referred to in Schedule 1 secures its particular context from being lumped together with "teachers and librarians" all of whom are in direct functional contact with students and therefore comprise a bargaining unit constituting "the academic staff." We are convinced that the development officer, although he is clearly employed, as part of his duties, in an advisory capacity, was not intended to be included in the academic bargaining unit. To rule otherwise would surely require a strained interpretation of the counselling function discharged by the development officer in providing interested persons with the benefits of his expertise.



18. It does not follow, however, that the development officer is deprived of a bargaining unit for purposes of being deemed an employee under section 1(1)(f) of the Act. The Board is satisfied that he is properly a part of "the support staff" bargaining unit defined in Schedule 2 of Bill 108. By virtue of the exercise of his expertise, skill and knowledge we are satisfied that he would fall into the category of a person employed in a "technical" classification. It therefore follows that the development officers reviewed in the Labour Relations Officer's Report are employees for purposes of the *Colleges Collective Bargaining Act*, 1975.

#### DECISION OF BOARD MEMBER J.D. BELL

1. I agree with the majority of the Board that the development officer, by virtue of the exercise of his expertise, skill and knowledge, would fall into the category of a person employed in a "technical" classification.

2. However, the duties and responsibilities of the development officer, as summarized in paragraph 9 of the majority decision, namely;

"... The development officer, whether by academic training or practical experience, must manifest skills in a variety of the facets of what constitute the achievement of the programmes' purpose. He must be aware of sundry occupational skills that are part and parcel of an employer's undertaking in order to analyse the needs of the company for purposes of designing and recommending a particular training programme. He must exercise the astuteness of an investigator and the incisiveness of a businessman in monitoring and negotiating the terms of a contract assumed by the employer. He must relate the human needs contemplated by the government subsidy to the realities of the employer's situation in assessing the efficacy of a particular programme. He must communicate in practical, pragmatic terms with persons whom he must convince require the benefits of a particular training programme. He must limit the expenditures of such programmes so as not to incur a liability to the college. Indeed, from the negotiation of the costs of a programme with the employer to assuaging the sensibilities of the employees' trade union representative, he must conduct himself with diplomacy and tact. *In short, the "development officer" is clearly a person who by virtue of his duties and responsibilities is a multi-talented individual whose expertise underlies the quality of the service offered by the community college,*"(emphasis added)

clearly indicates to me that he is now a managerial person responsible for the success of these training programmes and, as such, should be excluded from the bargaining unit by virtue of Schedule 2 Section V of the *Colleges Collective Bargaining Act*.

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**0162-77-U Bechtel Canada Ltd., (Applicant), v. The International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 700, John Anjema, et al, and Don Stewart, et al, (Respondents).**

**Accreditation – Section 123 – Strike – Whether individual employer member of accredited association has status to bring application – Whether accredited association a necessary party – Whether cease and desist order appropriate remedy in the circumstances.**

**BEFORE:** Pamela C. Picher, Vice-Chairman.

**APPEARANCES:** *Harry Freedman, Frank Gaspar and Gilles Gauvin for the applicant; Raymond Koskie, A.M. Minsky, S.J. Wahl, D. Stewart and J. Harrower for the respondents.*

**DECISION OF THE BOARD:** May 25, 1977

1. This is an application under section 123 of the Labour Relations Act; the applicant alleges that the respondent union has engaged in an unlawful strike and requests the Board to issue a declaration that an unlawful strike has taken place and a direction prohibiting any further such unlawful conduct.

2. On May 4, 1977 the Board issued a decision on two preliminary motions made by counsel for the respondents. With respect to one of the motions the Board stated that for reasons to follow in writing, if requested, the Board found that the employer had status to bring an application under section 123 notwithstanding the agreed fact that the employer is a member of an accredited employers' organization, the Ontario Erectors Association. By a letter dated May 5, 1977 counsel for the respondents requested reasons for the Board's ruling; the reasons, therefore, are set out below:

3. Section 116(1) of the Act reads as follows:

"Upon accreditation, all rights, duties and obligations under this Act of employers for whom the accredited employers' organization is or becomes the bargaining agent apply *mutatis mutandis* to the accredited employers' organization."

4. Counsel for the respondents argued that upon the accreditation of an employers' organization an employer falling within the scope of the accreditation loses all its rights, duties and obligations under The Labour Relations Act since by the unambiguous terms of section 116(1) all those rights, duties and obligations of the employer are applied to the accredited employers' organization. According to counsel for the respondents, one such right that the employer loses by virtue of section 116(1) is the right to bring an application under section 123 of the Act.

5. In support of this position, counsel for the respondents cited the Board's decision in *Lummus Company Canada Limited*, dated December 23, 1975 (File No. 1304-75-M, unreported). In that decision the Board ruled that it could not deal with a grievance arising under section 112(a) which named an employer within the accredited employers' organization as the respondent rather than the accredited employers' organization itself. In reaching its decision the Board looked to the provisions of section 116(1) and concluded that the em-

ployer had transferred its rights, duties and obligations under the Act to the accredited employers' organization. The Board is unable to adopt an interpretation of the word "transferred" in *Lummas* to include not only a granting of rights, duties and obligations to the association but also a removal of those same rights, duties and obligations from the employer.

6. In further support of his argument, counsel for the respondent relied on what he asserted to be the unambiguous wording of section 116(1) emphasizing that by using the word "all" the legislature intended that all rights duties and obligations would vest in the accredited employers' association and not merely some. The Board differs with the conclusion that the respondent counsel draws from the above proposition, that conclusion being that when all rights are vested in the accredited association all rights are thereby taken away from the employer. In the Board's view a vesting does not necessitate a divesting unless specifically so provided which is not the case in section 116(1) which states only that the employer's rights, duties and obligations will apply to the association. To suggest that "apply" necessitates a stripping of the employer's rights, duties and obligations is to unduly stretch the meaning of "apply".

7. Contrary to the proposition of counsel for the respondents, as well, the Board does not interpret "mutatis mutandis" as conveying a legislative intention that the employer becomes divested of its rights. The definition of "mutatis mutandis" in Black's Law Dictionary is as follows:

"With the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices and the like."

Osborn's *A Concise Law Dictionary* defines the phrase as "the necessary changes being made." The meaning the Board attaches to these words is one directed at alterations in form rather than substance. The accredited association's substantive adoption of rights, duties and obligations occurs through the operation of the plain meaning of section 116(1) quite apart from the phrase, "mutatis mutandis." "Mutatis mutandis" expresses the principle that any formal changes in the wording of the Act which need to be made to facilitate the operation of the substantive alteration of the rights, duties and obligations are deemed to have been made. For example, the Act dons the employer with a network of rights, duties and obligations. The language of most of these sections is broad enough to accommodate an exercise by the accredited association of the employer's rights, duties and obligations; in other words, in most instances, the machinery is already in place in the Act for the formal implementation of the employers' organization's newly acquired status. The phrase exists in the section, however, to allow for any formal alterations which might still be necessary. To suggest that the phrase implies that the employer is divested of its rights, i.e. that the changes contemplated by "mutatis mutandis" are substantive changes in the employer's status rather than simply any necessary changes in points of detail, is to step outside the meaning of the phrase.

8. The Board therefore, interprets section 116(1) as follows: upon accreditation, rights, duties and obligations of the employer are vested in the association; these same rights, duties and obligations, however, are retained by the employer such that the two bodies hold concurrent rights *except* to the extent that the employer is specifically deprived of



any of these rights by other sections of the Act. For example, section 119(1) of the Act which reads as follows prevents an employer covered by an accredited association from bargaining individually with the union or entering into a collective agreement:

“No trade union or council of trade unions that has bargaining rights for employees of employers represented by an accredited employers’ organization and no such employer or person acting on behalf of such employer, trade union or council of trade unions shall, so long as the accredited employers’ organization continues to be entitled to represent the employers in a unit of employers, bargain with each other with respect to such employees or enter into a collective agreement designed or intended to be binding upon such employees and if any such agreement is entered into it is void.”

Section 119(2) further prohibits a member employer from entering into an agreement or understanding with the union for the supply of employees during a legal strike or lockout.

9. By virtue of section 116(1) the accredited employers’ organization obtains the right to bargain and conclude collective agreements. It is, however, by virtue of section 119(1) and not section 116(1) that the member employer is prohibited from bargaining and entering collective agreements; in other words it is by virtue of section 119(1) rather than 116(1) that the accredited association becomes the exclusive bargaining agent.

10. The purpose of the accreditation scheme is to provide employers who employ employees from the same union to bargain with the union as a group rather than individually. By enabling employers to approach the union collectively it is felt that they can assume a more equal bargaining posture with the union. For this bargaining principle to operate, however, it is only necessary to prevent individual bargaining with the employers; it is not necessary to deprive employers of all their rights, duties and obligations.

11. Not only is it unnecessary to deprive the employer of more than its bargaining rights in order to achieve the purpose of the accreditation provisions of the Act, a closer look at particular sections of the Act highlights the impropriety of so doing. For example, section 120 of the Act imposes upon the accredited employers’ organization a section 60 type of duty of fair representation. This duty is imposed upon the association and the concomitant right to fair representation rests with the employer. If, however, the employer loses all its rights, the association would, simultaneously, hold the duty and the right to the performance of the duty. In other words, the duty would be unenforceable. Such a result, which flows directly from the respondents’ interpretation of section 116(1) of the Act, is unthinkable. Section 64 of the Act requires an employer to reinstate an employee engaging in a lawful strike where an employee makes an unconditional application to this employer within six months from the commencement of the strike. This employee right would become unenforceable as against an employer covered by accreditation if the employer was deprived of all its obligations under the Act. Section 119 which precludes the employer covered by an accredited association from dealing directly with the union would as well impose an empty obligation on the employer if section 116(1) strips the employer of all its obligations. And what becomes of employees who may be discharged for union activity contrary to the Act if through accreditation an employer no longer has the obligation not to refuse to continue to employ a person because that person is a member of the trade union? Can the

intended effect of section 116(1) of the Act be to allow employers to hide behind accreditation to the detriment of employees? And yet if "all" means a divesting of all rights, duties and obligations these results are inescapable.

12. By looking at the wording of the section, the purpose of the accreditation process, and the scheme of the Act as a whole, therefore, the Board found that section 116(1) does not operate to deprive the employer of any of its rights, duties or obligations under the Act but rather operates only to extend rights, duties and obligations to the accredited employers' association. Accordingly, the employer is only deprived of its rights to the extent that other sections of the Act such as section 119 specifically operate to do so. Because neither section 123 nor any other section of the Act specifically deprives an employer subject to accreditation of the right to bring an application under section 123, the Board found that Bechtel had status to bring the instant application notwithstanding that it is a member of the Ontario Erectors Association.

13. We turn, therefore, to a consideration of the merits of the application.

14. The evidence establishes that on April 26, 1977 no members of the Ironworkers, Local 700 who were employees of the applicant reported to perform the work which had been scheduled for them by the applicant. The evidence further establishes that the next day, April 27, 1977, all Ironworkers were back at work as scheduled.

15. The Board is satisfied that the underlying cause of the instant work stoppage was a dispute over Bechtel Canada Ltd.'s application of article 2.2 of the collective agreement, a collective agreement which the Board finds to have been in effect at the time of the work stoppage. Article 2.2 of the collective agreement provides as follows:

"Should the Local Union be unable to supply sufficient qualified Local Union members to meet the employer requirements, then the Local Union will bring in Union members from the closest sub-office or sub-offices in the territory of the Local Union or then the closest signatory Local Union where Union Members are available. Such Union members will receive their fare to the job site and subsistence allowance applicable to their sub-office or to the home Local of the member. Abuse of the intent of this clause and the unjustified receipt by any Employee of subsistence allowance, will be a violation of this Agreement and subject to the Grievance procedure."

The applicant introduced in evidence two telegrams which indicate how it has chosen to respond to article 2.2. The telegrams sent to the Ironworkers, Local 700 from the company on November 17, 1975 and January 6, 1976, respectively, read as follows:

"Re: Your conversation of November 10, 1976 with Mr. F. Gaspar, Bechtel Canada will only accept Structural Ironworker members referred as Sarnia area residents.

Bechtel Canada will accept only those Structural Ironworkers referred to the Mooretown, Ontario project as Sarnia residents or Sarnia referrals."



16. Mr. Gaspar, the labour relations representative for the applicant, indicated that in the life of the collective agreement, Bechtel has not paid a living or travel allowance to an Ironworker employer. While the addresses of the employees listed on Schedule A range from Newfoundland, to Michigan, to many points in Quebec, Mr. Gaspar stated that they have never been required to pay the living or travel allowance under article 2.2 because all of their Ironworker employees have been referred to the company, in accordance with the telegrams, as Sarnia residents or Sarnia referrals. Mr. Gaspar explained that Bechtel would not hire someone who was not referred as a local.

17. In April a request was made to the Ministry of Labour by the Ironworkers, Local 700 in concert with the Provincial Building and Construction Trades Council as well as the Bricklayers and Insulators for the establishment of an Industrial Inquiry Commission to look into the whole matter raised by the living and travel allowance problem.

18. The evidence also indicates that Local 700 has not ratified the proposed new collective agreement, that they have applied for conciliation and that they could be in a legal strike position in approximately three weeks.

19. Before determining the legality of this work stoppage, a preliminary issue must be addressed. Since both the strike declaration and direction available under section 123 are discretionary remedies, they do not issue as of right. The Board's general practice has been to refuse to exercise its discretion to issue either a declaration of an unlawful strike or a cease and desist order where the work stoppage has ended before the hearing as is the case here. (For a review of the practice and the rationale see the *Acoustical Association* case, [1975] OLRB Rep. July 539, *Beatty Bros.* (1965), 66 CLLC para. 16,049 and *National Refractories* (1963), 63 CLLC para. 16,276.)

20. The Board has consistently stated, however, that it will depart from this general practice of refusing to grant either a declaration or a direction in the face of the existence of any one or more of the following three circumstances: *firstly*, where the evidence establishes a past practice of unlawful strike activity, *secondly*, where the evidence indicates that the unlawful activity is likely to recur or *thirdly*, where the unlawful strike upon which the application is based has implications which extend beyond the immediate parties. Thus before addressing the merits of the work stoppage which is the subject of this application, we must decide whether, even if the stoppage were found to be illegal, we would exercise our discretion to make a declaration of illegality or issue a direction in relation to it.

21. Counsel for the applicant presented evidence of two previous work stoppages to support its contention that a past practice of illegal conduct has been sufficiently established to support the Board's issuing a declaration and a cease and desist order. The Board accepts from the evidence that on January 30, 1976 there was a work stoppage arising out of a jurisdictional dispute which the parties agreed was no longer outstanding and was unrelated to the cause of the instant work stoppage. Four persons who were personally identified as being involved in the instant work stoppage were identified as being involved in the work stoppage on January 30th. There was no evidence, however, as to whether the union supported the work stoppage and thus whether it would have been in violation of section 65 of the Act. The Board further accepts from the evidence that between September 29 and October 6, 1976 no Ironworkers from Local 700 crossed a picket line set up by another trade blocking all entrances to Bechtel's premises. The parties agree that the dispute causing this picket line



was unrelated to the Ironworkers, Local 700. The evidence establishes that two persons personally identified in the instant dispute were seen at the picket line; those two persons were different, however, from the four persons identified as being involved in the work stoppage of January 30, 1976. Once again no evidence was presented as to the role of the union in this activity.

22. On the basis of this limited evidence of work stoppages, the Board finds that a past practice of unlawful activity sufficient to support either a declaration or a cease and desist order has not been established by the applicant.

23. Turning to the question of a likelihood of recurring unlawful activity, the Board notes that while the disagreement over the application of article 2.2 of the collective agreement has been brewing for nearly two years, this is the first time that the dispute has erupted into a work stoppage. The evidence shows that the parties have continually sought to resolve their differences through discussions. The Board further notes that a request has been made for the establishment of an Industrial Inquiry Commission. Even if the Ministry decides not to establish the Commission, the Board views the request itself as evidence of an effort to settle the matter through legal channels. An additional factor to weigh is that in approximately three weeks the Ironworkers, Local 700 could be in a legal strike position. In view of the legitimate efforts at resolution already employed by the Ironworkers through both their ongoing discussions and their request for an inquiry, and in view of the legal means imminently available to the respondents to attempt to resolve the dispute underlying the instant work stoppage, the Board is not in sufficient apprehension of future illegal work stoppages to issue either a declaration or a cease and desist order. The Board trusts that the past resort to legal means will continue until the matter is resolved and is therefore of the view that a declaration that the instant work stoppage was either legal or illegal will not contribute to the settlement process.

24. With respect to the third criterion, counsel for the applicant was of the opinion that the work stoppage in question was not one which had implications beyond the immediate parties. As the work stoppage did not appear to be a part of a larger strategy supported by entities beyond the immediate parties, the Board is in agreement with counsel's assessment and thus declines to give a general advisory opinion on the legality of the instant work stoppage.

25. As the applicant has failed to establish the existence of any of the three exceptions to the Board's standard practice of declining to grant a remedy under section 123 when the respondents are back at work, the Board dismisses this application.

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**2021-76-R** Nicholas Robinson, (Applicant), v. International Brotherhood of Electrical Workers, Local Union 353, (Respondent), v. **J.A.K. Electrical Contractors Limited**, (Intervener).

**Termination – Whether application for termination voluntary.**

**BEFORE:** Kevin M. Burkett, Vice-Chairman and Board members M.J. Fenwick and F.W. Murray.

**APPEARANCES:** *Michael G. Horan and Nicholas Robinson for the applicant; A. Minsky and D. Baskin for the respondent; Harry Freedman for the intervener.*

**DECISION OF VICE-CHAIRMAN KEVIN M. BURKETT AND BOARD MEMBER F.W. MURRAY; May 18, 1977**

1. This is an application filed under section 49 of the Act in which the applicant seeks a declaration from the Board terminating the bargaining rights of the respondent trade union. The Board finds the application to be timely.

2. Section 49(3) of the Act states:

“Upon an application under subsection 1 or 2, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause (j) of subsection 2 of section 92 that they no longer wish to be represented by the trade union, and not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.”

3. A statement of desire in support of the application was filed with the Board prior to the terminal date of this application. The statement carries the following heading

“We, the undersigned no longer wish to be represented by the International Brotherhood of Electrical Workers Local Union 353 in our dealings with J.A.K. Electrical Contractor Limited.”

There were sufficient signatures affixed to the statement (i.e. not less than 45 per cent of the employees in the bargaining unit) that if it were proven to be a voluntary expression of those who signed it the Board would order a representation vote pursuant to the mandatory requirements of section 49(3) of the Act.

4. The Board must decide if it has been satisfied as to the voluntariness of the statement of desire on the basis of the evidence called in accord with paragraph 7 of Form 15, Notice posted re termination of bargaining rights. Paragraph 7 of Form 15 which was posted in the intervener’s place of business on or about March 23, 1977 reads as follows:

“Any employee or group of employees, who has informed the Board in writing of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained.”

**THE BOARD MAY DISPOSE OF THE APPLICATION WITHOUT CONSIDERING THE STATEMENT OF DESIRE OF ANY PERSON WHO FAILS TO ATTEND.”**

5. The Board in the *CCH Canada Limited* case [1975] OLRB Rep. Jan. 19, a case dealing with the termination of bargaining rights, discussed the evidentiary requirements which fall to the applicant in a section 49 application. The Board stated in that case:

“Therefore because employees are peculiarly susceptible to influence by an employer the Board requires the first hand evidence of both the origination and circulation of the petition as outlined in Rule 48. Only when this evidence is forthcoming is the Board in a position to determine that the statements of desire are an accurate reflection of the wishes of the employees who have signed them. In fact, the Board has been so conscious of the considerations outlined in *Pigott Motors (1961) Ltd., supra*, that it has placed great significance upon the custody of the petition throughout the period when it is being signed. If the custody cannot be substantially documented by direct evidence through this period the Board will not attach any weight to the document; (see *Vered and Harvey Company Limited* [1971] OLRB Nov. 736 and *Formosa Spring Brewery* [1974] OLRB Sept. 604).

As one deduces from reading the *Remington Rand Limited* case the Board applies the same standards to the evidence supporting an application for termination as it applies to petitions in opposition to a trade union that arise during the certification procedures. This position is outlined in *Riel and Int. Bro. of Teamsters Local 230* (known as the *Harry Haley & Sons* case) 58 CLLC ¶18,106 where the Board described its approach in the following way:

“The Board has consistently held that like principles should be applied to the documents filed in support of applications by employees for termination of bargaining rights. In other words the Board has taken the position that even though a majority of the employees in the bargaining unit have signed a document purporting to be an expression of their wishes that they no longer wish to be represented by a trade union, there may be circumstances surrounding the origination or circulation of the document or documents in question which do not make it incumbent on the Board to direct a representation vote.”

In fact the use of the word ‘voluntary’ in section 49(3) seems to be a specific legislative direction to the Board to inquire into the history of ostensible wishes of those employees sub-



scribing to an application for termination; (see *P. Chapman Cartage Ltd.* [1972] OLRB Jan. 356).

Therefore, while it is not necessary that there be eyewitness testimony to the actual inscribing of each signature; (see *U.A.W. and Matczynski* [1967] OLRB Mar. 976 and *Pyrotenox of Canada Ltd.* 60 CLLC 65) there must be sufficient direct evidence of both the manner of obtaining signatures and the origination of the statements of desire. Thus it has been said that 'omissions in the evidence must inevitably raise questions which detract from the weight to be given to the petitions as being signatories'; (see *UAW and Watt* [1965] OLRB Oct. 472)."

6. In this case the applicant has satisfied the evidentiary onus. The Board has before it first hand evidence of the origination, preparation and circulation of the statement filed in support of the application. The three bargaining unit employees who gave evidence in this regard were unshaken in their testimony that management played no part in the origination, preparation or circulation of the statement of desire and indeed the evidence which is before the Board does not reveal a management presence. Counsel for the union has argued, however, that the Board should reject the evidence of those appearing on behalf of the application and find that the applicant has not satisfied the legal onus of establishing the voluntariness of the document.

7. Mr. Nicholas Robinson, the applicant, testified that when he received a "paper" from the Board in March of this year he realized that the respondent trade union was continuing to actively represent the bargaining unit employees. Mr. Robinson testified that he did not want the trade union to represent him and accordingly he discussed the situation with two fellow employees who were sympathetic to his point of view. The "paper" which Mr. Robinson referred to was a Board notification with respect to an arbitration filed by the union under section 112(a) of the Act on behalf of the bargaining unit employees. The grievance was in respect of the failure of the company to pay to its employees the wages and benefits set out in the collective agreement to which it was bound by virtue of a Board accreditation. The respondent trade union was successful in its section 112(a) application and the company was found to be bound by the terms of the aforementioned collective agreement. The ensuing discussion between the parties resulted in a \$15,000 settlement in favour of the bargaining unit employees who have brought this application for termination of bargaining rights. The three bargaining unit employees who testified in support of this application were entitled to amounts ranging from \$1,200 to \$2,052 as a result of the aforementioned arbitration which was pursued on their behalf by the respondent trade union. All three testified that they would rather forego the money than be represented by the trade union. There is no evidence before the Board to suggest that the respondent union has been deficient in its representation of those in the bargaining unit and indeed, the evidence is to the contrary.

8. The applicant, Mr. Nicholas Robinson, who signed a card in support of the union testified at the certification hearing in May, 1976 in support of the objecting employees. The Board dismissed the statements in opposition to the certification of the union as not being voluntary. The Board concluded at paragraph 7 of its decision (see *J.A.K. Electrical Contractors Limited*, Board File 0301-76-R, dated June 9, 1976.

"The Board has reviewed the evidence in this matter and has come to the conclusion that the employer was inextricably bound up with the 'change of heart.' The employer threatened termination, conducted a meeting with his employees at which he asked that they change their minds, he promised to negotiate with them, he provided the paper upon which the statements were written, collected the statements and brought them to the Board. In the circumstances the Board must conclude that the statements were not voluntary and as a result the Board declines to order a vote and instead, having regard to the membership evidence, certifies the applicant."

9. Counsel for the respondent union argued that the applicant had not satisfied the legal burden of establishing the voluntariness of the statement of desire on the balance of probabilities. Counsel for the union asked the Board to consider the background as set out in its decision of June 9, 1976, and the "unbelievable" testimony of the witnesses for the applicant with respect of their preparedness to hurt themselves (i.e. forego significant amounts of money) in order to have the bargaining rights of the union terminated. Counsel argued that the employees, in pursuing this application were in flagrant disregard of their own best interest and were in fact acting in the best interests of the employer. The respondent asked the Board to find as not credible the testimony of the witnesses for the applicant and to accordingly dismiss the statements as not having been proven as voluntary.

10. In the instant case the Board has before it first hand oral testimony as to the circumstances surrounding the origination, preparation and circulation of the statement of desire which, if accepted as credible evidence, would establish the voluntariness of the statement. The Board has been asked to discount this testimony on the basis that the persons giving it are the same persons who opposed the union in the certification hearing and because their explanation as to why they wish to disassociate themselves from the respondent casts into doubt their credibility. The Board has weighed all of the evidence and considered the representations of the parties and is satisfied that the statement filed in support of this application is a voluntary expression. The Board has held that an application filed under section 49 of the Act by persons who supported a petition in opposition to the certification of the union is not tainted and may be viewed as evidence of a continuing opposition. [See *Artistic Woodwork Co. Ltd.* case [1973] OLRB Rep. Sept. 691, *DeVilbiss (Canada) Limited*, December 7, 1976 (unreported)]. Although the decision to terminate bargaining rights in the face of the \$15,000 settlement achieved by the union is an unusual response to say the least, there is evidence before the Board to suggest that the employees perceive of the downturn in the respondent's business as having been caused by its unionization. Approximately one half of the twenty man work force has been laid off in the last year. The Board is not prepared to discredit the testimony of the employee witnesses because of what may or may not be a faulty perception on their part. In the absence of evidence to indicate that the company was in any way involved in the application, and in the face of first hand evidence of the origination, preparation and circulation of the statement which, in all material aspects, stood up under cross-examination, and which established that the origination, preparation and circulation were free of management interference, the Board is compelled to find that the statement is a voluntary expression of those who signed it.

11. The Board is satisfied that not less than forty-five per cent of the employees of the intervener in the bargaining unit at the time the application was made have voluntarily sig-



nified in writing that they no longer wish to be represented by the respondent union as of March 30, 1977, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the said Act.

12. The Board directs that a representation vote be taken of the employees of J.A.K. Electrical Contractors Limited. Those eligible to vote are all electricians and electrician's apprentices in the employ of J.A.K. Electrical Contractors Limited in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario save and except non-working foremen and persons above the rank of non-working foreman, on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

13. Voters will be asked whether or not they wish to be represented by the respondent union in their employment relations with J.A.K. Electrical Contractors Limited.

#### **DECISION OF BOARD MEMBER M.J. FENWICK:**

1. I dissent from the decision of my colleagues.

2. They and I do not differ substantially as to the applicable law. However, my view of the facts differs considerably from that of my associates.

3. I draw an opposite inference from the conduct and testimony of Mr. Nicholas Robinson and his two workmates who appeared before the Board.

4. These applicants are no strangers to the Board, nor are they inexperienced in the matter of petitions. In May of 1976 Mr. Robinson, the present applicant, appeared before this Board allegedly on behalf of a group of objecting employees who had "voluntarily" decided to revoke their membership in the trade union.

5. Then, as now, Mr. Robinson tendered a petition wherein the employees indicated that they had a "change of heart". At the risk of being repetitive, it may be worthwhile to repeat the finding of the Board in that case since there, as here, Mr. Robinson appeared in support of an allegedly voluntary expression of the employees free from the influence of management. The Board wrote as follows:

"The Board has reviewed the evidence in this matter and has come to the conclusion that the employer was inextricably bound up with the 'change of heart'. The employer threatened termination, conducted a meeting with his employees at which he asked that they change their minds, he promised to negotiate with them, he provided the paper upon which the statements were written, collected the statements and brought them to the Board. In the circumstances the Board must conclude that the statements were not voluntary ..."



6. Now Mr. Robinson is before us again, with another petition which again allegedly represents the voluntary wishes of the employees and is free from the influence of management. In the earlier case this Board found that the employer improperly interfered with the free exercise by the employees of their rights under the Act. At best Mr. Robinson was the beneficiary of that improper interference and at worst (and this is the view that I prefer to take) he was an agent of the employer and remains so to this day. In this regard, it is interesting to note the event which sparked this renewed and allegedly voluntary opposition to the trade union.

7. *The majority has found that there is no evidence whatsoever to suggest that the trade union has been deficient in any way in the representation of the interests of the employees in the bargaining unit.* Indeed this Board is *unanimously* of the view, on the basis of the evidence before us, that the union has in fact properly represented the employees.

8. It is ironic that the event which prompted this current petition was the notification that the trade union was seeking to enforce the legal rights of the employees before this Board. As a result of the union's application on behalf of these employees, the Company which had previously been disregarding their legal rights under their collective agreement, was prompted to reach a settlement which may bring the employees between \$1,200 and \$2,000 per person. In addition with studied aplomb Mr. Robinson asked the Board to believe that he did not want an hourly pay hike amounting to over \$1.50 which the union had negotiated for his classification.

9. One can understand why the employer would wish to get rid of the union in the circumstances, but it is unconceivable (and unbelievable) that the employees would consider the possible payment of up to \$2,000 per employee as a reason for eliminating the union.

10. The better view, and the one which I take of the facts, is that Mr. Robinson is, and continues to be the agent of management and is acting both subjectively and objectively in the interests of management as he has done in the past.

11. To find otherwise, would in my submission be to reject common sense. Mr. Robinson and the other two petitioners who appeared before this Board, clearly and forthrightly testified that they would rather give up the \$1,200 to \$2,000 which the trade union secured for each and every member of the bargaining unit, and to which they were all legally entitled, rather than have the trade union continue to represent them. I rather doubt whether this view is shared by the employees who are entitled to this substantial money payment and I also doubt whether the proposition was ever put to them. In any event, on the basis of the foregoing evidence and reasons, I would find that the petition is not a voluntary expression of the wishes of the employees but rather has been influenced by the participation of Mr. Robinson who can only be perceived as the agent of management and acting in its behalf.

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**0169-77-M Teamsters Local Union No. 879, (Applicant), v.  
Canadian Industrial Contractors, (Respondent).**

**Arbitration – Section 112a – Whether failure of employer to follow prescribed disciplinary procedure nullifies discipline imposed.**

**BEFORE:** Kevin M. Burkett, Vice-Chairman and Board Members O. Hodges and F.W. Murray.

**APPEARANCES:** *Stanley Simpson and L. Schultz for the applicant; Nick Chewka for the respondent.*

**DECISION OF THE BOARD; May 27, 1977**

1. This is a complaint filed under section 112a of the Act.
2. This matter arose out of an alleged violation of a subsisting collective agreement between the company and the union. Mr. L. Westfall, a professional driver for 19 years, who commenced his employment with the company in December of 1976 alleges that he was discharged without just cause on Thursday, April 7, 1977. The evidence establishes that on that day Mr. Westfall refused to drive the truck which was assigned to him and was consequently terminated by Mr. N. Chienka, the company superintendent. Mr. Chienka testified that the grievor refused a direct order and as a result was liable to discharge pursuant to Rule 4(e) of the company's Rules and Regulations which are appended to the collective agreement. Rule 4(e) stipulates that a first offence of deliberate disobedience of orders of authorized personnel shall leave the offender subject to discharge. Mr. Westfall testified that the truck he was assigned had a large hole in the exhaust system which he had reported to the company the preceding day and which had not been repaired. It is the contention of the union that the condition of the vehicle was such as to justify the grievor's refusal to drive it because of the potential health hazard created by the exhaust fumes. Notwithstanding the contractual obligation which falls to the company to maintain its vehicles (Article 11), the evidence establishes that the company does not maintain its vehicles on a day to day basis but rather repairs its vehicles as a last resort. Whereas the Board does not make a finding with respect to the legitimacy of the grievor's refusal to operate the vehicle it is satisfied that the exhaust system of the vehicle in question was as it has been described by the grievor.
3. The evidence establishes that the grievor was appointed union steward effective February 15, 1977 and that pursuant to the requirements of Article 6.1 of the collective agreement notice of his appointment was sent to the company by registered letter. The registered letter reads as follows:

"Canadian Industrial Contractors  
932 Brant Street  
**BURLINGTON**, Ontario  
Dear Sirs:

Please be advised that Larry Westfall has been appointed Chief Steward representing your employees effective immediately.

We trust the above Steward will receive your full support and co-operation while working within this capacity.

Yours truly,

(sgd.) J.P. Contardi

PRESIDENT

c.c.

Len Schultz, Business Representative, Local 879

Larry Westfall, Chief Steward"

Article 6.4 of the collective agreement provides:

"Should there be any cause to discharge a Steward the employer shall in every case notify the local union in writing so that the local union is in receipt of such notification before such discipline or discharge. However, the Company reserves the right to insist that a Steward leave the premises."

The evidence is clear and uncontradicted in respect of the obligation imposed upon the company under Article 6.4 of the collective agreement. The company did not notify the local union in writing or otherwise before (or after) the discharge of Mr. Westfall. It is the contention of the union that irrespective of the merits of the grievance, the failure of the company to comply with article 6.4 renders the discharge a nullity.

4. Arbitrators have, in the main, recognized the desirability of maintaining the arbitration procedure as one which facilitates a disposition of the complaint giving rise to the grievance without undue scope for technical and/or procedural interference. [See *Hamilton Terminal Operators Ltd. and International Longshoremen's Association, Local 1879*, 17 L.A.C. 181 (Arthurs).] Notwithstanding the desirability of maintaining access to a hearing of the merits the arbitrator, whose authority is derived from the collective agreement, must look to the agreement of the parties. It is that agreement which is determinative of whether a procedural or technical objection is to be given effect. With respect to procedural time limits, recent authority holds that not only must the language be mandatory but that a penalty which in some way disentitles one offending party must be stipulated as well if the effect of non-compliance is to interfere with a hearing of the merits. [See *Dominion Truck Lines Ltd. and Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 141* [1975], 60 D.L.R. (3d) 37 (Wells).] Even in such circumstances a party which processes a grievance beyond the point of the alleged procedural defect without mention of the defect cannot rely upon it. [See *Regency Towers Hotel Ltd. and Hotel and Club Employees Union, Local 299* [1973], 4 L.A.C. (2d) (Schiff).] If this Board viewed the requirements as set out in article 6.4 of the instant collective agreement as procedural only, it would be hard pressed to refuse to determine the matter on the merits solely on the basis of the company's failure to adhere to the requirements of article 6.4.



5. Article 6.4, however, must be construed as not only a section which establishes a procedure but one which by its operation confers substantive rights. The article does not appear within the section of the agreement designated "Grievance Procedure and Arbitration" (Article 7) but rather it is found in the section entitled "Union Representative" (Article 6) and when read in conjunction with article 6.6 which sets out the responsibility of the steward vis-a-vis the other bargaining unit employees it must be found to confer substantive rights upon both the individual steward about to be discharged and the trade union. The parties have decided that the individual steward must not be placed in the position of having to represent himself in respect of his own impending discharge and that the other employees must not be left without representation in the event of the discharge of a steward (which they might be if the steward were discharged without prior notice to the local union). The operation of article 6.4 allows the local union to provide for both the representation of the individual steward and the bargaining unit employees under his stewardship.

6. In the circumstances the Board must distinguish this case from those dealing solely with procedural irregularities. There are a series of cases which have held that clauses similar to article 6.4 in the instant agreement confer a mandatory right of a substantive nature which, if not complied with, voids the subsequent imposition of discipline. In *CIP Containers Ltd. and International Chemical Workers, Local 229* [1973] 2 L.A.C. (2d) 308 the arbitrator ruled that the failure of the company to state the cause of the discharge in writing or to provide a fair and impartial hearing "prior to the imposition of discharge" as required by the collective agreement rendered "the disciplinary action taken against the grievor to be void *ab initio*." In setting out his reasons the arbitrator in the above case referred to *Budd Automotive Co. and U.A.W. Local 1551* (February, 1972) reported in *Labour Arbitration News*, April 1972, wherein the failure of the company to comply with the procedure set out in the following clauses gave rise to a technical objection:

"7.01 Any employee who is to receive a written warning, suspension or discharge shall be removed from his work station and taken to an office. He may, if he so desires, request and obtain the presence of his steward to represent him during such an interview. During such interview, the employee will be advised of the offense committed.

7.02 Following a full investigation of the details a supervisor will advise the employee and the steward of the penalty to be imposed at the conclusion of the shift following the one on which the offense occurred."

The arbitrator in upholding the technical objection reasoned as follows:

"I find these provisions to be completely independent of what may follow in the grievance procedure resulting from the initial action of the company, or the basic rights of an employee. He has been given by the parties the right to receive the charge against him in the privacy of an office, the right to know the penalty within the time stipulated in 7.02 and the right of representation. *These are substantive rights which must be accorded to the employee if the right of the company to initiate discipline is to be given weight. The failure, then, to allow these rights to the employee is not a failure to follow procedure ... these are obligations which cannot be*

*ignored by the company in the imposition of discipline. In my view the parties have balanced the basic rights of the company and the employee for the purpose of discipline by which the exercise of the company's right to discipline must be met with the employee's right. It is not a matter going solely to the assessment of the penalty but goes to the very acts of discipline itself ... In conclusion, I find that Article 7.01 and 7.02 are not procedural in effect and provide substantive rights to the employees which cannot be denied them by the company and must be strictly applied. In the event of the company's failure to grant such rights to the employee involved and to carry out the terms of these provisions, I find that the imposition of discipline would be void ab initio ... (emphasis added.)*

See also re *Valade v. Eberlee* [1972] 1 O.R. 682, *Mirador Motor Inn and Hotel, Club, Restaurant, Tavern Employees. Local Union 261* [1973] 2 L.A.C. (2d) 339 (Abbott), *Dundas Professional Firefighters Association and Corporation of the Town of Dundas* (September 9, 1975) unreported, (O'Shea). The failure of an employer to follow a procedure designed to confer a substantive right upon an employee about to be disciplined nullifies the discipline which follows. In such circumstances it is not necessary that a specific penalty be set out in order to render the procedure a mandatory precondition to the imposition of discipline. In this respect the arbitral jurisprudence distinguishes between clauses which are procedural only and those which confer by virtue of their operation a substantive right upon the employee who is the subject of the discipline.

7. Article 6.04 of the collective agreement requires the company to notify the local union in writing "before" discharging a union steward. The clause provides substantive rights, as described in paragraph 4 herein, which must be conferred "in every case". The language of the clause is such as to make compliance with it imperative. The evidence establishes, however, that the company did not comply with the requirements of article 6.4 and accordingly the discharge of Mr. Westfall, a union steward, cannot be given effect.

8. The Board directs that the grievor be reinstated into his employment forthwith, without loss of seniority, and that he be compensated for his lost wages from the date of his discharge to the date of his reinstatement. The Board will remain seized in the event the parties are unable to agree upon the amount of compensation owing.

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**0066-77-M** Labourers' International Union of North America, Local 183, (Applicant), v. **Schwenger Construction Ltd.**, (Respondent).

**Arbitration – Section 112a – Whether lay-off of union steward proper.**

**BEFORE:** E. Norris Davis, Vice-Chairman, and Board Members N. B. Satterfield and H. Simon.

**APPEARANCES:** A. Minsky, D. Baskin and Tom Connelly for the applicant; R. A. Werry and J. Bodwell for the respondent.

**DECISION OF THE BOARD; May 12, 1977**

1. This is an application under section 112a in which the applicant alleges violation of the collective bargaining agreement entered into as of October 12, 1976 in connection with the layoff of specific union stewards.
2. The respondent is engaged in construction work and is currently working on a project for the City of Toronto involving tunnelling which has been under way for in excess of two years.
3. The facts giving rise to the alleged contract violations are simple and undisputed as follows:

- (a) As of March 16th, 1977, work was proceeding on the project on a three-shift basis. The applicant was represented by a steward on each shift. The assignments at this time were
  - 1st shift steward – Mr. Fred Gillis
  - 2nd shift steward – Mr. Harry Roche
  - 3rd shift steward – Mr. Pat Glennon

Evidence was that the first shift was a fixed shift and the other two shifts rotated weekly with one another. Rotation of the shifts were of the complete crew, including the union steward.

- (b) While nothing turns upon it, it should be noted that Mr. Roche had acted as a steward from September 23, 1974, Mr. Glennon from February 17, 1975 and Mr. Gillis from March 25, 1976.
- (c) In the afternoon of March 16, 1977 at a group meeting of employees, they were advised by a company representative that there was to be a layoff. Mr. Gillis, the union steward, and one other employee from the first shift were laid off out of a total crew of 8.

Additionally, 19 other employees were advised by phone during the day of March 16th that they would be laid off. Included in the 19 was Mr. Harry Roche, the second shift union steward. A total of 6 employees from the 2nd and 3rd shifts were transferred to the 1st shift including Mr. Pat Glennon, the 3rd shift union steward.

- (d) No work of any kind was performed on March 17th or 18th, but work resumed on the first shift on March 21st with the enlarged crew, save for Mr. Pat Glennon who was absent on vacation for that whole week.
- (e) The nature of the work, up to March 16th, 1977, was tunnelling. Thereafter, actual tunnelling ceased and the nature of the work became maintenance, taking the mole out of the tunnel and



clean up of the tunnel. Howbeit, the parties are agreed that the question of competency of the grievors to do the work remaining is not in question.

- (f) Mr. Tom Connolly, Union Business Agent, in response to a phone call from one of the stewards, visited the project site and met with the Project Manager and Superintendent. Connolly took the position that the shop stewards could not be laid off and that the respondent had no right to replace the steward on the first shift. The respondent's representatives remained firm in their decision and, consequently, Connolly contacted Mr. Bodwell who was in overall charge of the project and arranged for a further meeting, which ultimately took place on Wednesday, March 23rd.
- (g) At the meeting of March 23rd, Connolly requested that Gillis be restored to the day shift as there was no steward representation because of Glennon's absence. On Bodwell's refusal, Connolly suggested that Roche be placed on day shift, in order to provide union representation. Bodwell refused to reinstate either Gillis or Roche on the day shift but offered to reinstate them on March 31st when it was expected a three-shift operation would resume. He finally compromised to bring the two men back to work on the first shift on March 29th, but not to permit either of them to act as steward.
- (h) On April 4th, the three-shift operation was restored and Roche and Gillis returned to the 2nd and 3rd shifts respectively as stewards, alternating as previously. Glennon remained on the day shift and continues to be recognized by the respondent as a steward.

- (i) The applicant claims relief, *inter alia*,

- (i) a declaration that the respondent's actions were a violation of Article 9:02 of the Agreement;

- (ii) an order that the respondent recognize and be bound by the applicant's appointment of Fred Gillis as steward for the 1st shift.

4. Article 9:02 of the Collective Agreement sets forth that the respondent agrees "... one steward per shift per shaft will be recognized ..." and "... the steward will not be excluded from overtime work on his crew, provided he is able to do the work required, and shall be one of the last two men retained by the employer, if competent to perform the available work remaining".

5. The Board is invited by the applicant to find that, under Article 9:02, the appointment of stewards is for the project, rather than for a specific shift, and that the preferential right of retention in employment extends to available work on any shift of the project. It has

sought to bolster this position by the filing of the letters of steward appointment, which, in all cases, are worded with reference only to the project.

6. In our view, the language of these letters insofar as they bear on the point of issue are at best ambiguous, and, in any event, cannot supersede the language of the agreement which states "... on tunnel projects one steward per shift per shaft will be recognized ...".

7. It is evident that the purpose of Article 9:02 is to provide for union representation in policing the agreement within identifiable work groups. Evidence was presented that the steward for a specific shift was appointed from the crew of that shift, and, in fact, when the crew rotated to another shift time, that the steward stayed with that crew. The Agreement is clear that "the steward will not be excluded from overtime work *on his crew* ..."; the right of the applicant to appoint a steward is dependent on the existence of a shift and, similarly, when the shift is discontinued, there is no longer the need or the right for such appointment.

8. The right of the steward to be "one of the last two men retained by the employer ..." must clearly be dependent on his continuing to hold the office of steward – which is clearly impossible when the shift is discontinued. We cannot agree that the right to preferential retention in employment carries with it a right to preferential transfer.

9. Accordingly, we find:

- (a) The respondent was not entitled to lay off Mr. Fred Gillis on March 16th. Mr. Gillis was steward on the first shift, more than two men on that shift were retained, and Mr. Gillis was entitled, under the Agreement, to have been retained. The action taken by the respondent was a clear violation of the Agreement.
- (b) On the discontinuance of the second shift on March 16th, there was no work for Mr. Roche or any other employee on that shift and the respondent was under no obligation, arising out of Article 9:02, to transfer Mr. Roche.
- (c) In respect to Mr. Glennon who was transferred to the first shift, we cannot quarrel with the right of the respondent so to do. Indeed, the applicant did not quarrel with this right at the hearing. However, since a steward is restricted to the existence of a specific shift, it follows that on the acceptance of a shift transfer, Glennon cannot carry with him his union officership. It is undoubtedly open to the applicant to make a new appointment of Glennon to the position of steward on the first shift if it so desires, but it does not lie in the power of the respondent to effectively confer any such rights on him.

10. The Board directs that the parties confer with a view to agreeing on the quantum of any compensation due to the grievors and to report thereon to the Board. In the meantime, in the event the parties are unable to come to an agreement, the Board will remain seized of the matter.

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**2204-76-R** Teamsters Union Local 938, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant), v. **Alex Henry & Son Ltd.**, (Respondent), v. Group of Employees, (Objectors).

**Certification – Membership Evidence – Whether trade union statements constitute misrepresentation and affect union membership evidence.**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and D. B. Archer.

**APPEARANCES:** *I. J. Thomson and W. Reilly for the applicant; David I. Wakely, Alec Henry and R. Henry for the respondent; Stan Dawson and Abel Fanjoy for the objectors.*

**DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL; May 13, 1977**

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of The Labour Relations Act.
3. Having regard to the agreement of the parties, the Board further finds that all employees of the Respondent working at or out of Metropolitan Toronto, save and except foremen, those above the rank of foreman, dispatchers, office and sales staff, and those working less than 24 hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. A statement of desire bearing some 24 signatures was filed in opposition to this application. Since the number of signatures overlapping the membership evidence filed was sufficient to cast doubt on that evidence the Board conducted its usual inquiry into the origin and circulation of the petition to determine whether it was voluntary.
5. Having regard to the fact that the petition appears to have been inspired and circulated at least in part by Mr. S. Duffet who at all material times was acting as a foreman, the Board is not satisfied, on the balance of probabilities, that the petition is the voluntary expression of the wishes of the employees who signed it. The Board's vigilance in regard to such petitions and its particular concern that the will of employees be in no way influenced by the direct or indirect participation of management is well established. In *Trench Electric Ltd.* (Board File No. 1671-75-R) the Board expressed itself as follows:

The Board is inherently suspicious of the voluntary nature of statements of desire which have been circulated by persons exercising even limited managerial authority and has held that where such a person is known by the employees in the bargaining unit as capable of affecting their employment relationship the statement does not reflect the voluntary wishes of the employees who sign it (See *Link Manufacturing Ltd.* case [1954] Board File No. 48682-53-R, *Leamington Vegetable Growers Co-operative* case [1974] OLRB Rep. June 402).



See also *Pigott Motors (1961) Ltd.* 63 CLLC ¶16,264; *Morgan Adhesives of Canada Ltd.* [1975] OLRB Rep. Nov. 813; *Dad's Cookies Ltd.* [1976] OLRB Rep. Sept. 545. The Board does not, therefore, order a representation vote by reason of the statement of desire.

6. The respondent requested that the Board dismiss this application on the ground that the employees were the subject of intimidation or coercion on the part of the applicant, contrary to section 61 of The Labour Relations Act which provides:

61. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employer's organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

7. Mr. Abel Fanjoy, a truck driver employed by the respondent testified that during the applicant's organizing campaign he attended a meeting at the Beverly Hills Hotel. The meeting was called by the applicant union and some ten employees were present. Mr. Fanjoy's evidence was that during the course of that meeting Mr. W. Reilly, a union organizer with the applicant, addressed the employees, telling them that they could join the union at that time for a fee of two dollars but that if they joined at a later date it would cost them fifty dollars. Mr. Fanjoy said that he took that statement to mean that if the applicant were successful in its certification drive those employees who did not join prior to certification and who wanted to retain their jobs afterwards would be required to join the union at the higher initiation fee of fifty dollars. That would be so, of course, only if the applicant were later successful in negotiating a union shop contract with the employer and its constitution and by-laws provided for a higher post-certification initiation fee which it would then be unable or unwilling to waive. This last clarification was not provided to the employees by the union organizer. Mr. Fanjoy's testimony in this regard seemed to the Board to be cautious and fair in its effort at clear recollection, and as Mr. Reilly was present at the hearing and did not testify to contradict the employee, we accept as accurate Mr. Fanjoy's account of the statement and the circumstances surrounding it.

8. In an application for certification the Board's concern with the nature of acts and representations made in the course of soliciting union membership is twofold. Firstly the Board must be satisfied that the applicant has avoided any conduct proscribed by The Labour Relations Act, including section 61. Secondly, the Board must be satisfied that any signed membership applications that the union submits in support of its request for certification are an accurate representation of the wishes of each employee and were not obtained in circumstances tainted by any procedural irregularity or misrepresentation.

9. We are satisfied that Mr. Reilly's statement was not intimidation or coercion within the meaning of section 61 of The Labour Relations Act. (See *Milnet Mines Limited* 53 CLLC ¶17,063; *Canadian Fabricated Products Limited (Stratford)* 54 CLLC ¶17,090; *Du Pont of Canada Limited* [1961] OLRB Rep. 360; *Max Factor and Company* [1964] OLRB Rep. Feb. 616; *Kitchens of Sara Lee (Canada) Limited* [1964] OLRB Rep. Apr. 44; *Walter E. Selck of Canada Limited* [1964] OLRB Rep. June 138; *Canadian Electric Box and Stampings Limited* [1964] OLRB Rep. Sept. 284; *L. M. Welter Limited* [1965] OLRB Rep. Apr. 34; *VR/Wesson Limited* [1968] OLRB Rep. Nov. 811; *Fabricon Manufacturing Limited* [1969]

OLRB Rep. June 353; *Green Giant of Canada Limited* [1973] OLRB Rep. June 376; *The Kendall Company (Canada) Limited* [1975] OLRB Rep. Aug. 611.).

10. We are not, however, satisfied that the statement might not have raised a real misapprehension among the employees as to their rights in respect of the union. A reasonable employee hearing Mr. Reilly might well have concluded that upon the union being certified he would have no alternative but to pay the higher fee if he wanted to keep his job. An employee forming that view might have signed a membership application as a result of what amounts to a tacit misrepresentation on the part of the union representative.

11. The Board's consistent policy in certification proceedings has been to require the highest standard of integrity on the part of union officers in the soliciting, gathering and presentation to the Board of documentary evidence in support of their application. Since that evidence remains confidential, is not subject to cross-examination and is the principal evidence on which the Board must rely in certification proceedings, it must be free of any cloud or taint. If, in view of the circumstances touching the soliciting and collecting of the membership evidence, the Board is left in doubt it may use its discretion to order a representation vote to resolve that doubt.

12. A union officer is under a duty to refrain from making false or misleading statements in the course of an organizing campaign. We find that the statement of Mr. Reilly, which might better be termed a half-statement, is latently, if not patently, misleading. His failure to explain his statement to the employees by omitting to say that the higher initiation fee would be forced on them only if the union could succeed in its application for certification, could thereafter successfully negotiate a union shop contract with the employer and would at that time be unable or unwilling to waive the higher initiation fee, leave this Board in some doubt as to whether employees for whom membership evidence was filed were in fact misled and therefore unable to fairly weigh the meaning of Mr. Reilly's statement as it might affect them. This raises some doubt as to whether the membership evidence filed is an expression of the true wishes of the employees.

13. The Board therefore order the taking of a representation vote of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

14. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

15. The matter is referred to the Registrar.

#### DECISION OF BOARD MEMBER D. B. ARCHER:

I dissent. The Board not having found any breach of section 61 of the Act the applicant is entitled to certification and I would have so ordered.

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**1415-76-U** Stephen T. Wills, (Complainant), v. **Seneca College of Applied Arts and Technology**, (Respondent).

**Section 79 – Whether breach of collective agreement also constitutes breach of Colleges Collective Bargaining Act – Whether remedy for alleged breach may be pursued before the Board.**

**BEFORE:** Rory F. Egan, Alternate Chairman, and Board Members O. Hodges and W. H. Wightman.

**APPEARANCES:** *Stephen T. Wills and Diane M. Wills for the applicant; Janice A. Baker, Brock D. Wallace, Howard Gilchrist and Murray Tait for the respondent.*

**DECISION OF THE BOARD;** January 20, 1977

1. The name “The Board of Governors, Seneca College of Applied Arts and Technology” appearing in the style of cause of this application as the name of the respondent is amended to read: “Seneca College of Applied Arts and Technology”.
2. The complainant alleges that he has been dealt with by the respondent contrary to the provisions of section 76(2)(c) of the Colleges Collective Bargaining Act, 1975, (hereinafter referred to as “the Act”). Section 76(2)(c) provides:

“76. – (2) The Council, an employer or any person acting on behalf of an employer shall not,

- (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or cease to be a member of an employee organization, or to refrain from exercising any other right under this Act,

but no person shall be deemed to have contravened this subsection by reason of any act or thing done or omitted in relation to a person employed in a managerial or confidential capacity.”

It is of importance to note that the complainant does not allege that the respondent has sought in any way to compel him to take any action with respect to membership in an employee organization. He bases his complaint upon that part of section 76(2)(c) which reads “or to refrain from exercising any other right under this Act”.

3. In setting out in his application the details of his complaint, the complainant makes no reference to any section of the Act embodying a right which he alleges he has been compelled to refrain from exercising. Reference is made to provisions of the collective agreement which exists between the respondent and The Civil Service Association of Ontario (Inc.), the bargaining agent for employees in the bargaining unit to which the complainant belongs. The details of the complaint to which reference has been made above are set out by the complainant as follows:



“On or about Nov. 21 & Nov. 27 & Dec. 3, 1975 the grievor was dealt with by Mr. Frederick W. Etherden, Dean, Finch Campus of the respondent contrary to the provisions of Section 76(2)(c) of the C.C.B. Act, 1975 in that he did on his own behalf or on behalf of the respondent:

1. Failed to invoke Article 4.02(a)(ii), as provided in the Colleges’ “Memorandum of Agreement”, dated September 17, 1975.
2. Intimidated and threatened and harassed the grievor so as to obscure and preclude the grievor’s right to know of and to employ Article 4.02(a)(iii), of the Memorandum of Agreement.
3. In explicit instance dealt in bad faith with the grievor.
4. Failed to recognize specific determinant facts and information presented.
5. Effected dismissal action on the basis of arbitrary inference.
6. Principally effected defamation of the grievor’s professional integrity.”

4. The sections of the collective agreement referred to by the complainant read as follows:

“4.02(a) Recognizing the unique characteristics of each College, the diversity of programmes and instructional techniques and the consequent range and variety of individual assignments, the parties agree that within three (3) weeks following the publishing of instructional assignments in September, a College Instructional Assignment Committee of six (6) persons (three (3) persons to be appointed by each party and to include the College President or Senior Administrative Academic Officer) shall meet to:

- (ii) resolve apparent inequitable instructional assignments;
- (iii) consider a claim by an individual that his instructional assignment is inequitable.”

5. The respondent raised preliminary objections at the hearing. These objections were set out in a Schedule to the Reply which is reproduced below:

“A”

1. The complaint discloses no violation of any right of the Complainant under this Act. In fact, the Complainant states therein that he is not a member of any union. It is submitted that there being no allegation of a violation of the Act, the Complaint should not be proceeded with and should be immediately dismissed.

2. The allegations in Section 4 of the Complaint as to acts complained of are based on the provisions of the Collective Agreement. Such rights are not proper matters for determination by the Labour Relations Board but are to be decided at arbitration under the Collective Agreement and pursuant to the legislation.
  3. The Complainant's grievance against dismissal was determined by an Arbitration Board decision dated April 28, 1976. Such Arbitration Award is final and binding upon the Complainant. The dismissal of the grievance included consideration of the matters arising under Section 4 of the Complaint. Therefore, it is improper for a Complaint to be considered concerning the same matter on the basis of *res judicata*.
  4. In these circumstances there is no jurisdiction in the Labour Relations Board to entertain the matters set out in the Complaint.
  5. The Respondent denies the other allegations contained in the Complaint and puts the Complainant to the strict proof thereof.
6. In response to the position taken by the respondent in its preliminary objections, the complainant referred to the fact that he had received from the Solicitor for the Board a letter dated October 13, 1976, in the following terms:

"Dear Sir:

Thank you for your recent letter of September 20, 1976.

There are no forms specifically provided for the administration of the Colleges' Collective Bargaining Act. The practice of the Board, therefore, is to use the forms which have been provided under the Labour Relations Act striking out "Labour Relations Act" and substituting "Colleges' Collective Bargaining Act" where appropriate. A complaint under section 78 of the Colleges' Collective Bargaining Act is therefore made in form 32 with the amendments to the form which I have indicated. The Board proceeds in a manner which is analogous to a proceeding under section 79 of the Labour Relations Act; I therefore direct your attention to rules 28 to 31 and rule 47 of the Board's Rules of Practice (a copy of which is attached). I have also attached six copies of form 32 and you will note that that form must be submitted in quadruplicate to the Registrar of the Ontario Labour Relations Board at the above-noted address.

Yours very truly,"

7. The complainant argued that, since the Solicitor for the Board had written the above, it must be concluded that the Board had determined that he had a case under the Colleges' Collective Bargaining Act and that it had jurisdiction to hear him.

8. The complainant also made reference to section 46(1) of the Rules of Procedure. That section reads as follows:

“46. – (1) Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.”

9. The complainant also argued that since the Board had appointed a Labour Relations Officer to inquire into the matter, and that since, following the inquiry of the officer, the Board had not dismissed the complaint under section 46(1), then the Board must have acknowledged that his claim has validity under the Act.

10. The Solicitor's letter is, of course, not binding upon the Board in any event. Furthermore, it is clear on its face that the letter simply sets out the procedural steps to be followed in order to get a complaint before the Board and in no way attempts to deal with the merits of the case. The letter has nothing whatever to do with the decision-making powers of the Board and, to repeat, only delineates the method to be followed in properly bringing a question before the Board.

11. Insofar as section 46(1) of the Rules of Procedure is concerned, the decision of the Board to grant a hearing in the matter obviously is not determinative of any of the issues that may be raised in an application of complaint, including the question as to whether jurisdiction lies with the Board or the question as to whether there is, in fact, a *prima facie* case for the remedy requested in the application. In the present case, the fact that the Board did not dismiss under section 46(1) of the Rules is not dispositive of the issues raised by the respondent or by the complainant, including those raised in the preliminary objections. Indeed, the language of the complaint is such that it might well have been that the complainant might have intended to refer to a specific section of the Act other than section 76(2)(c). The preliminary inquiry, however, has indicated that such was not the case.

12. We might add at this time that in response to the respondent's allegation that a Board of Arbitration had already dealt with the matters raised by the complaint, including Article 4 of the collective agreement, the complainant stated that Article 4 had not been a part of the matter dealt with by the Board of Arbitration. He also advised the Board that the arbitration decision had been submitted for judicial review.

13. The Act provides, in terms similar to those employed in The Labour Relations Act, a method, by way of arbitration, for the disposition of complaints raised under the terms of a collective agreement and another method for the disposition of claims of violations of rights arising under the Act through hearings before the Ontario Labour Relations Board.

14. Section 47 of the Act contains the arbitration provisions required to be contained in collective agreements. Section 47(1) states:

“47. – (1) Every agreement shall provide for the final and binding settlement by arbitration of all differences between an employer and the employee organization arising from the interpretation, application, ad-



ministration or alleged contravention of the agreement including any question as to whether a matter is arbitrable.”

Section 47(5) provides:

“47. – (5) The decision of an arbitrator or of an arbitration board is final and binding upon the employer, employee organization and upon the employees covered by the agreement who are affected by the decision, and such employer, employee organization and employees shall do or refrain from doing anything required of them by the decision.”

15. Section 78(1) delineates the jurisdiction of the Ontario Labour Relations Board in the following way:

“78. – (1) The Ontario Labour Relations Board may appoint an investigator with authority to inquire into a complaint that,

- (a) a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment;
- (b) a person has been suspended, expelled or penalized in any way contrary to section 80;
- (c) an employee organization, employer or any person or persons has acted in any way contrary to section 77 or 81.”

16. The remedial powers of the Ontario Labour Relations Board are set out in section 78(4)(c) of the Act in the following terms:

“78. – (4) Where an investigator is unable to effect a settlement of the matter or where the Ontario Labour Relations Board in its discretion considers it advisable to dispense with an inquiry by an investigator, the Ontario Labour Relations Board may inquire into the complaint and,

- (c) if the Ontario Labour Relations Board is satisfied that the employee organization, Council, employer, person or employee concerned has acted contrary to section 77 or 81, it shall determine what, if anything, the employee organization, Council, employer, person or employee shall do or refrain from doing with respect thereto, and such determination may include compensation for loss of earnings and other employment benefits and the employee organization, Council, employer, person or employee shall, notwithstanding the provisions of any agreement, do or abstain from doing anything required of them or it.”

17. It obviously follows from a reading of the sections of the Act cited above that there are two areas of adjudication set out in the Act – the one dealing with violations of the terms of collective agreements, and the other with questions of violation of rights arising under the Act itself. Notwithstanding the distinction between the areas of offence and jurisdiction set out in the Act, there are occasions where an act complained of may very well constitute a violation of the terms of a collective agreement and at the same time a violation or denial of a right arising under the Act. In such cases, the tribunal concerned may feel required to defer to the other jurisdiction. In the present case, however, this dilemma can only exist if the complainant can disclose a right arising under the Act which he alleges has been violated. As has already been indicated, the complaint makes no reference to any section of the Act other than section 76(2)(c) and it should be emphasized that during the preliminary hearing, the complainant was asked on several occasions to indicate to the Board the particular section of the Act which he claimed as the basis for his allegation that he had been compelled to refrain from “exercising any other right under this Act”.

18. It may be trite, but it would appear necessary, nevertheless, to say at this point that it is incumbent upon anybody claiming relief under section 76(2)(c) to indicate where in the Act the right said to have been violated is set out. The Board has no jurisdiction to create “rights” to fit the particular needs of a complainant, but is restricted to those set out in the Act.

19. It is clear that Item #1 in the complaint has reference only to the Memorandum of Agreement and alleges a failure to evoke its provisions. Item #2 uses the words “intimidated” and “threatened” which reflect, to a degree, the language used in section 76(2)(c), but the intimidation and threat in the complaint plainly do not refer to matters of right under the Act. A right to know of and to employ provisions of a Memorandum of Agreement is not a matter dealt with under the Act. The Board therefore finds that there is nothing in Item #2 of the complaint indicating a violation of a right under the Act.

20. In view of some of the arguments made by the complainant at the hearing (as the Board understands it), it is necessary to say that the Act does not compel the completion of a collective agreement, but provides only that efforts be made to reach one, and for certain terms where one is reached. That is, there is no “right” to a collective agreement under the Act.

21. Item #3 indicates no claim of a violation of any right provided under the Act and, if indeed there is any substance to the claim, it is clearly a matter to be dealt with under the collective agreement. Item #4 falls into the same category as Item #3. Item #5 is a matter which had been arbitrated and is presently under judicial review according to the complainant. Item #6 again makes no reference to any violation of the Act and, again, may be a matter to be dealt with under the terms of the collective agreement.

22. The Board, having heard the representations of the parties, finds that the preliminary objection of the respondent must be upheld, since there is nothing in the complaint or the representations made in support thereof which directly or inferentially indicate any issues involving rights arising under the Act.

23. The Board therefore has no jurisdiction to deal with the matter and the complaint is accordingly dismissed.

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**1415-76-U Stephen T. Wills, (Complainant), v. Seneca College of Applied Arts and Technology, (Respondent).**

**Reconsideration – Whether Board may reconsider decision made under Colleges Collective Bargaining Act – Whether reconsideration appropriate in the circumstances.**

**BEFORE:** Rory F. Egan, Alternate Chairman, and Board Members O. Hodges and W. H. Wightman.

***DECISION OF THE BOARD: May 5, 1977***

1. The complainant has requested the Board, “as allowed under section 95(1) of the Act and Regulation 46(2) and (3)”, to reconsider its decision of January 20, 1977.

2. The complaint dealt with by the Board in the above decision was launched under the provisions of the Colleges Collective Bargaining Act, (hereinafter referred to as the CCBA). Section 95 of that Act deals with the applicability of the Arbitrations Act and the Statutory Powers Procedure Act to matters arising under the CCBA. The section makes no reference to the matter of reconsideration of decision. Furthermore, there is no other section contained in the CCBA which specifically empowers the Board, when acting under its provisions, to review any decisions made with respect to matters arising under that section as section 95(1) of The Labour Relations Act does with respect to matters arising under that Act.

3. Section 95(1) of The Labour Relations Act provides:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

4. It must be assumed that the section 95(1) referred to by the complainant in his request for reconsideration is section 95(1) of The Labour Relations Act. Since a statutory board such as the Ontario Labour Relations Board has no inherent jurisdiction, it would appear that in the absence of specific reference to powers of reconsideration in the CCBA, there is a question as to whether the Board carries with it any powers of review when adjudicating under the latter Act.

5. The complainant also bases the request for reconsideration upon Regulations 46(2) and (3). This again has obvious reference to the Rules of Procedure and Regulations made under The Labour Relations Act and raises a similar question as to their applicability to matters arising under the CCBA.

6. In any event, the complaint was not dealt with by the Board in the manner outlined in Regulation 46 – a fact, indeed, relied upon by the complainant himself at the hear-



ing. The fact is that the complaint came on directly for a hearing before the Board at which the preliminary objections referred to in the decision were raised. The preliminary objections together with the submissions on the complainant in response thereto, were considered by the Board before it arrived at its decision. Section 46 of the regulations, therefore, has no application to the present situation.

7. We might say, at the outset, that even if the Board were presumed to have the power to reconsider, it would do so only upon the same grounds as it does when it elects to exercise the power to reconsider its decisions made under The Labour Relations Act.

8. Under The Labour Relations Act, the Board has consistently refused to reconsider a decision unless the party seeking the relief indicates there has been new evidence discovered which could not previously have been obtained by reasonable diligence or that it wishes to make representations or objections not already considered by the Board and which it had no opportunity to raise at the hearing. Even if it be assumed, without so finding, that the complainant has established a right to reconsideration under the CCBA, the Board can find nothing in the case that was not urged or which could not have been urged by the complainant at the initial hearing and the request must consequently be denied.

9. We might add that the complainant, in his request, has clarified the position he took at the hearing. That is to say that he re-states the fact that he bases his claim for relief upon the argument that a breach of the collective agreement is also a breach of the CCBA and therefore involves a matter which ought to be dealt with by the Board. The section relied upon is section 52(1) which provides:

An agreement is binding upon the Council, the employers and the employee organization that is a party to it and upon the employees in the bargaining unit covered by the agreement.

The parallel section of The Labour Relations Act is section 42 set out below:

A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

10. Section 52(1) corresponds sufficiently to section 42 of The Labour Relations Act to make the Board's jurisprudence in relation to the latter section and cases involving an alleged breach of a collective agreement of considerable value and persuasive force in dealing with cases under the CCBA.

11. In this regard, we would refer to the decision of the Board in *National Showcase Co. Ltd.*, 61 CLLC ¶16,185. In that case, a complaint was made to the Board of violation of The Labour Relations Act which might have been brought as a grievance alleging a breach of a collective agreement existing between the parties. The relevant portion of that decision reads as follows:

It seems to us, therefore, in determining whether we should exercise our discretion under section 57, subsection 4, it is proper to take into account the fact that an alternative remedy is one which the parties themselves have agreed to, and, further, involves a procedure under which the parties agree to attempt to settle the dispute themselves before bringing in an outsider, that is, an arbitrator, we have no hesitation in saying that we ought not to proceed further under section 57, subsection 4.

While in the special circumstances of a particular case we might well be persuaded to take the contrary view, in all the circumstances of this case we can find no reason to depart from the general principle enunciated above.

12. In the *Pitt Street Hotel Ltd.* case, 63 CLLC ¶16,275, the Board stated:

When an alternative remedy exists under a collective agreement which is available to the complainant, the Board is of the opinion that it should not inquire into an alleged complaint arising out of a violation of some provision of the Act. Notwithstanding this, however, there are exceptional circumstances in which the Board, in the exercise of its discretion under section 65, subsection 4, will inquire into a complaint. One of these circumstances is when there is an allegation of collusion.

13. In the case of *Boivin v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67*, 67 CLLC ¶16,004, the Board dealt with the matter of alternative remedies where it was alleged that the union had procured the discharge of the complainant. In the circumstances of that case, the Board decided to hear the complaint, its reasons, in part, being expressed as follows:

In the instant case, there is a collective agreement in effect, and it would appear that an alternate remedy exists under the grievance and arbitration provisions of that agreement. It is not alleged that there has been collusion between the employer, who is not a party to this proceeding, and the trade union. The allegation is rather that the union itself wrongly procured the discharge of the complainant. Where the trade union has itself procured the discharge of an employee, it would be unreasonable (to say the least) to expect it then to carry that case through the arbitration process on the employee's behalf. Further, in these circumstances, it would be unfair to regard the employer as alone liable to the employee for his wrongful discharge. In any event, it was conceded by the representative of the respondents that the complainant had no effective recourse, apart from that now sought, for the wrong done him. It is clear that the circumstances of this case come within the class of "exceptional circumstances" to which the Board referred in the *Pitt Street Hotel Ltd.* case, and which were contemplated in the *National Showcase Co. Ltd.* case, and also perhaps in the *Heist Industrial Services* case, *infra*. The instant case follows the policy expressed by the Board in its previous decisions.

14. There can be little doubt from a reading of the above-noted cases that the complaint in the present matter before the Board would have been referred by the Board to arbitration had the initial attempt for adjudication on the issues raised by the complaint been made to this Board. There are no extraordinary circumstances here of the kinds referred to in the jurisprudence cited above which might have caused the Board on an initial application to hear the matter rather than defer to arbitration. Moreover, in the present case, the question of deferment did not arise since the complainant had already chosen his forum before any issue came before the Board. He had his case heard and disposed of by a board of arbitration under the collective agreement. He obviously was not satisfied with the decision made by the arbitration board. He advised the Board at the hearing that he had taken the arbitration decision to the courts. In addition, in this application, he seeks to have the arbitration decision reviewed and, hopefully, reversed by this Board. This Board is not a forum of appeal from the decision of an arbitration board.

15. In the result then, the request for reconsideration is denied.

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**O. 1867-75-R** University of Windsor Faculty Association, (Applicant), v. University of Windsor, (Respondent), v. Group of Employees, (Objectors).

**Certification – Employee – Whether department heads are managerial employees.**

**BEFORE:** D.H. Kates, Vice-Chairman and Board Members J.E. C. Robinson, Q.C. and P.J. O’Keeffe.

**APPEARANCES:** *H. Goldblatt and Dr. Paul Cassano for the applicant; Leonard P. Kavanaugh, Charles F. Clark and Gary D.T. Wintermute for the respondent; Dr. Howard D. McCurdy for the objectors.*

**DECISION OF THE BOARD:** May 9, 1977

1. By decision dated May 11, 1976 the Board granted an interim certificate extending bargaining rights for a unit of the respondent’s academic faculty and professional librarians. Persons employed as “department heads” in the numerous faculties comprising the respondent university remained in dispute. At issue was the employment status of such employees having regard to the provisions of section 1(3)(b) of The Labour Relations Act.

2. The parties agreed that the Labour Relations Officer submit an interim report consisting of the examinations of eight department heads and that “the Board make its determination as to whether or not the department heads should be in or out of the bargaining unit.” There are approximately twenty-nine department heads whose employment status is at issue.

3. The respondent university is a creature of *The University of Windsor Act*, 1962-63 as amended. Pursuant to the incorporating statute the affairs of the university are administered by the Board of Governors and the Senate. Management and control of the university



is vested in the former body and purely academic policy matters are reserved to the latter. The president of the university is the chief executive officer and upon his recommendation the Board has power to appoint and remove both faculty and administrative personnel from the university. The respondent is not unlike other large bureaucratic enterprises where decision making authority is diffused amongst various sectors of the university. The issues raised by the parties pertain to defining the parameters of authority in matters relating to the material well being of the members of the bargaining unit. On the one hand the respondent submits that decision making authority ought to be perceived as being exercised from the top of the structural pyramid delineated in the Legislation which subsequently has been delegated throughout the university's departments, faculties and schools. The exercise of real decision making discretion stops at the first line supervisor, the department head, whose "effective" recommendations bear some real impact on the terms and conditions of employment of the faculty members he supervises.

4. The applicant trade union submits the department head is an employee just as his colleagues who belong to the same department are employees entitled to collective bargaining. Indeed the responsibilities delegated the department head owe their origins to the members of the department. Decision making at the departmental level is basically participatory or a shared responsibility amongst employees affected by a particular subject of deliberation. The "collegial" pattern of decision making through the sundry committees established to deal with issues affecting the faculty member is intrinsically democratic with the department head responsible for the co-ordination of the process. There is no dispute that the exercise of his responsibilities are significant but, nonetheless, are dependent upon the approval of his colleagues. The department head is "primus inter partes" with respect to colleagues in the bargaining unit who play a significant role in approving this appointment as well as reviewing his performance. They are not consultants, as alleged by the respondent, but are the source of his delegated authority.

5. Professor McCurdy, who submitted a brief on behalf of the group of objectors, argues quite forcefully that the collegial decision making process does not always presuppose an element of shared decision making between the department head and the members of the department. Although it is conceded in the sophisticated setting of a modern day university comprised of individuals who are basically free and autonomous that important decisions affecting the university and its academic staff would not be made without recourse to a consensus. In fact, Mr. McCurdy would have preferred to press the argument that all faculty staff, having regard to their participation in the decision making processes of various facets of the university, are by definition managerial. (See the *St Thomas University case* (1975) 60 D.L.R. 3rd 176, where this thesis was categorically rejected.) Alternatively, Professor McCurdy submits that the department head "ought to be excluded from the unit because of the exercise of managerial powers" and because in being "the first amongst equals" he must when a consensus is not established determine the issue at hand. Without the department head's exclusion from the bargaining unit "the collegial decision making process" cannot operate. Not only is the department head the co-ordinator of the committee system of deliberation but he is also the spokesman for management charged with certain responsibilities that can only be implemented if separate and apart from his colleagues. Notwithstanding Professor McCurdy's concession with respect to "the realities" of seeking the input of academic employees in decisions that affect the university the department head continues, in the last analysis, to exercise a form of veto power in the event of a conflict between an arrived at consensus and a contradictory university policy.

6. The applicant trade union argues that the exclusion of the department head would indeed undermine the democratic nature of the decision making process as anticipated by the collegial system by virtue of the alienation of the person holding the pivotal function of the co-ordinator of the committee system. The respondent simply submits that the collegial system, although applied peculiarly to the university setting, is merely a sophisticated means of tapping the expertise of talented individuals whose consultations on significant matters is no different than in any other informal bureaucratic process of decision making. In this context, the respondent asks the Board to apply the considerations we would normally weigh in resolving the managerial dilemma to justify the exclusion of the department head from the appropriate bargaining unit.

7. Much has been written about the peculiarities of the decision making process of the university enterprise, having regard to the many interest groups the institution is designed to serve. Basically there are three major sectors comprising the population of the university, namely, the faculty, students and support staff. Administration of the university, having regard to its constitutional make-up, is carried out by persons retained from outside the university setting who represent many facets of the social community. The decisions made affecting university objectives are shared decisions with the input of representative individuals appointed from the major sectors of the university. The influence exercised by these groups are usually in direct relationship to their capacity to exact political leverage upon the university's formal decision making processes. Indeed such leverage may arise through the organizational vehicles of entrenched lobby groups or by *ad hoc* arrangements made with respect to critical issues affecting the university. To suggest that the type of relationships established in the university setting is similar to the type of hierarchical decision making processes of other large bureaucratic undertakings is to miscomprehend the nature of the university enterprise as presently conceived by enlightened individuals representative of all sectors of the university community. More particularly, it is this recognition of the peculiar nature of the university as evidenced by its incorporating statute that all members of the university community are invited, through their representatives, to participate in the policy making decisions that are designed to achieve the university's goals. Moreover, the consequences of this reality may create conflict where this decision making process fails to achieve satisfaction with respect to the terms and conditions of employment of the university's employees. That is to say, the participatory decision making process, when it fails to accommodate perceived needs of employees, may precipitate a desire by those employees to seek the benefits prescribed in accordance with The Labour Relations Act. To what extent therefore, does the Act, and therefore the Board, in administering the Act attempt to accommodate conflicts between the decision making process of the university and the adversarial premise of the collective bargaining process? This was the very question discussed in *Re Faculty Association of the University of St. Thomas and St. Thomas University*, et al, (1975) 60 D.L.R. (3d) 176 at p. 182 (per Hughes, C.J.W.B.):

"In my opinion the powers conferred on the university by section 1(d) [of *The Act to Incorporate Saint Thomas College*, 1934 (NB)] do not differ in nature from the inherent power of any natural person or group of persons without legal disability to employ others to perform special duties at compensation fixed by the employer. If the university were a public body instituted to perform some public duty possibly a distinction might be found which I do not find here. *In my view the powers conferred on the university are to be exercised in accordance with general law*



*applicable to other employers such as laws respecting hours of work, minimum wages, unemployment insurance and industrial relations.*

I do not think that the Act of Incorporating either expressly, or impliedly, confers a power on the university which is incompatible with the coexistence of a collective agreement or the collective bargaining process."

8. In a like manner we are of the view that the decision making process as prescribed by the respondent's incorporating statute ought not to be considered as abridging the entitlement of employees to the benefits of collective bargaining. The inconveniences that may ensue as a consequence of a certificate granting a trade union bargaining rights on behalf of its employees may require organizational adjustments to the employer's decision making structure. In short, collective bargaining necessarily anticipates a re-assessment of the employer's processes in order to accommodate the interposition of the trade union. The particular difficulties raised in this case is in resolving whether within the respondent's organizational set-up the first line of managerial supervision ought to be drawn at the level of the department head. And in dealing with that question the Board is of the view that we are not bound by pre-existing conceptions of how individuals within the university hierarchy may construe the inherent conflicts that may arise out of the decision making powers anticipated by the respondent's incorporating statute. Needless to say, however, the exercise of managerial functions presupposes a measure of independent discretion that would be rendered ineffectual if brought in conflict with the manager's loyalties to his colleagues in the appropriate bargaining unit.

9. Can such a conflict said to be the case in assessing the duties and responsibilities of the department head? The Board has heretofore referred to the numerous committees that the department head chairs with respect to the administration and operation of the department. He is appointed by the president upon the consultation and recommendation of his colleagues in the department. He holds the office for a period of three to five years subject to re-appointment for another term. He receives no extra remuneration although he may carry a reduced teaching load and gain entitlement to other fringe benefits. The amount of time devoted to the duties of department head varies from person to person. Among his administrative duties he, in consultation with department members, allocates courses to instructors, prepares class and examination timetables and participates in the formulation of the curricula of his department. He possesses a master key which suggests he is responsible for security of the department building. He supervises the support staff of secretarial and clerical employees assigned to serve the faculty within the department. The department head is involved at the first step of the grievance procedure affecting support staff personnel. At times the department head attends meetings where support classifications and pay increases are discussed. It should be stressed however, that the support staff are presently represented by their own bargaining agent.

10. In dealing with his colleagues in a particular department the department head does not monitor the faculty member's performance in the classroom. He does not determine salaries or sit on faculty grievances. The department head chairs most of the committees that affect the department and its members. Hiring, promotion and tenure, sabbatical leave and dismissal are determined by consensus at meetings of the committees assigned these tasks. The department head may exercise his discretion to break a tie vote at a com-



mittee meeting. Some department heads indicated that they would not exercise their prerogative in this manner. Others, in the event that they did not agree with the committee consensus would attach to the committee's report a minority decision. The department head acts as the liaison with the dean and other officials of the university. The department head is responsible for the distribution of merit pay. He may elect a number of methods for distribution that run the gamut of unilaterally selecting beneficiaries to convening an *ad hoc* committee of the department with a view to determining the most equitable basis for distribution. In all committee matters there remains the requirement for the report to be approved by the dean and other officials such as the president before the decisions are ultimately arrived at by the Board of Governors, or the Senate, as the case may be. Sessional lecturers and teaching assistants may be hired by the department head with or without the consultation of the department faculty. Candidates for permanent positions are screened by the department head and referred to the Appointments Committee for decision. The department head will prepare an evaluation report of a candidate's application for promotion and/or tenure upon meeting with the Faculty Committee. A candidate may make a personal appearance before the Committee to argue his case. Review of employees' performance with a view to dismissal may be conducted by the department head at the instance and the recommendation of the Departmental Council. A department head has asked a faculty member to resign. But such proceedings are extremely rare. Disciplinary recourse may be taken, however, through the determination of the faculty member's eligibility for promotion and/or tenure. Renewal of contracts are approved by the faculty promotional tenure committee. Budgets are prepared upon receipt of estimates from each faculty member. Money is allocated in accordance with the priorities established by the Budgets Committee. The department head performs no significant role in determining final budget figures once the estimates leave his department. Faculty salaries are not included in the budget estimate. The department head approves applications for sabbatical leave. The selection of sabbatical leaves is determined in accordance with the Faculty Handbook where it might or might not pass through the Departmental Council, but ultimately must have the approval of the president. So long as the sabbatical leave (or for that matter outside consulting work) does not interfere with the scheduling of course work the department head usually will approve the request. With respect to all the matters discussed above the department head maintains "confidential files" pertaining to the terms, classifications and past teaching record of all members of the faculty. This information may be made available to faculty committees when deliberations are held with respect to a particular individual. He signs research applications in order to signify the availability of facilities and the capabilities of the candidate. One department head indicated he signed the research application merely to confirm that it had been made.

11. The Board in *The Carleton University* case [1975] OLRB Rep. June 500 determined that the faculty chairman was an employee for purposes of The Labour Relations Act and thereby did not exercise managerial functions, notwithstanding his significant duties and responsibilities. These responsibilities were seen both from the perspective of his administrative duties and the mundane operations of the department inclusive of his supervisory role with respect to support staff. In the latter regard the Board was of the view that notwithstanding the significant duties involving the support staff they consumed a small percentage of his overall responsibilities. From that perspective it was opined that because the department head was not a member of the support staff bargaining unit no conflict with respect to the effectiveness of the performance of his supervisory functions could be anticipated. Indeed, he would not share any community of interest with members

of the support staff unit to justify the conflict of interest concerns raised by the respondent. The Board is of the view that nothing adduced in this case has persuaded us to depart from that particular posture. And, secondly, the Board assessed the department chairman's role from the perspective of his duties in chairing the various and sundry committees where decision making within the department is purportedly shared. The Board was of the view that basically decision making at the faculty level originated at the committee level and flowed upwards through the dean and the president, etc. to the Board of Governors and the Senate, as the case may be. In examining the details of the department chairman's role within the academic and bureaucratic framework of the university the Board resolved that the tests normally applied in the industrial model for examining the hierarchical exercise of authority must take into account the significant differences presented by the university model. Indeed nothing adduced in the evidence has persuaded this panel of the Board that the decision making process at the University of Windsor differs in a fundamental degree from the model described at Carleton University. Moreover the decisions affecting significant areas of concern, such as hiring, promotion and tenure, dismissal and the determination of course curricula, are reached "at the faculty level where decision making is shared by the entire faculty that operates through a committee system." Therefore, in refusing to exclude the department chairman from the bargaining unit the Board concluded:

"In those areas of greatest importance – hiring, tenure, promotion and dismissal – the dominant role is played by the department collectively. It is true that the chairman assembles data, makes presentations, gives evaluation reports at higher committee levels, etc., but he does so as a representative of the department, scrupulously expressing the will of his colleagues rather than his personal views, as the particular recommendation proceeds through the review process. In the more routine areas, while some potential for the exercise of independent discretion exists, it is for the most part narrowly circumscribed. Moreover, in a substantive sense, the decisions in these areas are of limited importance. It is true, for example, that the Departmental Chairman has some independent discretion in the employment of the administrative staff and, possibly, summer lecturers. These persons, however, are not in the bargaining unit and we see no reason for excluding the chairman on that ground. In our view, the infrequent exercise of authority over the office staff poses no danger of conflict of interest within the unit. It is important to emphasize that the overwhelming proportion of the Chairman's duties have nothing whatever to do with the supervision or control of the department's small clerical staff."

12. In reaching this conclusion the Board relied heavily upon a decision of The Labour Relations Board, (B.C.) in *The Vancouver City College* case (1974) Canada Labour Relations Board, Rep. 298. In that case the board reviewed the duties and responsibilities of faculty members classified as divisional chairmen. The faculty was organized into fifteen departments, each with a chairman. The departments were themselves grouped into four divisions, each of whose activities were directed by a division chairman. He basically exercised many of the administrative prerogatives of the department head at the respondent university. But of more significance was his pivotal role with respect to the committees established to formulate policy with respect to faculty objectives and the terms and conditions of employment of faculty members. The Board described the collegial decision making process and the role of the divisional chairman in this context as follows:



"... That function does not appear to be *management* – the exercise of authority over a group of people. Instead, it appears to be *co-ordination* of the instructional efforts of the many people in the division. The key indicia of managerial authority – the power to hire and fire, to evaluate and promote – are not features of the position. I do not mean to say that the Division Chairmen have no part to play in these decisions because they are made somewhere higher up. As a practical matter (subject to formal approval by the Principal), these are group decisions. The Division Chairman participates in the group and has substantial influence. However, so do ordinary faculty members who, as individuals, are clearly "employees" under the Code. Division Chairmen have no authority to impose discipline, except perhaps by way of verbal reprimands. They do prepare budget recommendations, but that task appears to be largely one of compiling figures with the real judgments about where to cut or where to expand being made elsewhere, again by a group..."

13. The Board has not been convinced that the department head, apart from his significant administrative duties, plays a managerial role in arriving at decisions in matters described by the Board in the past "as those areas of greatest importance." This is to say, in relation to decisions involving the hiring, promotion, tenure and dismissal of faculty, shared decision making is the realistic mode of arriving at a result. The recommendations in these matters are only "effective" to the extent that they represent committee consensus. We do not hold that merely because a particular department head, because of his expertise and reputation may play a dominant role in the establishing that consensus, that he nonetheless deserves to be excluded from the bargaining unit. The parties by their agreement determined the Dean of the Faculty to exercise managerial functions. The Board finds that the first line managerial exclusion ought to be drawn at that level. Although the complaint is that such a circumstance deprives the faculty department of an immediate spokesman vis-à-vis management, we are of the view that the shortcoming, if it exists, is a matter that may be remedied through departmental co-operation with the dean or through negotiation with the faculty bargaining agent. Indeed, the department head, through the authority delegated him by the committee system, is more akin to the shop steward than the first line supervisor. It ought to be his function to keep departmental faculty in touch with policies of the university through a closer liaison with the dean. In that capacity his community of interest with members of the bargaining unit will have been confirmed. The Board finds that the department head does not exercise managerial function for purposes of section 1(3)(b) of the Act and is therefore an appropriate member of the academic bargaining unit.

14. Mr. J.E. Leonard is directed to meet with the parties with a view to resolving the employment status of the members of the faculty who remain in dispute.

#### **DECISION OF BOARD MEMBER J.E.C. ROBINSON, Q.C.**

1. I have read the decision of the majority and must, with respect, dissent.

2. I have heretofore expressed my views with respect to the employment status of "the department chairman" in my dissenting opinion in the *Carleton University case* (supra). In having regard to the duties and responsibilities of the "department head" engaged by the



respondent university I am convinced of the correctness of those views. Indeed, I am at a loss in comprehending the majority's failure to take into account the hardship that the respondent's faculties and departments would suffer as a result of the restructuring of its decision-making process. The faculty members are to be denied immediate recourse to a representative of management in alleviating concerns that pertain to not only their terms and conditions of employment but generally with respect to the operation of a department. In other words, the majority in designating the "department head" as a potential shop steward fails to address itself to the very important managerial functions discharged by the "department head" thereby depriving the employees concerned with the vehicle to achieving the harmony that ensues from the sophisticated procedures applied by each of the interested parties to resolving their difficulties.

3. The majority's failure to appreciate that collegial decision making encompasses the exercise of a veto when consensus within the department is not reached has resulted in its arriving at unworthy conclusions. Indeed, notwithstanding recognized differences in the collegial decision making processes and procedures adopted in other bureaucratic enterprises, I am of the view that the Board's jurisprudence ought to be applied with the same cogency in determining the employment status of members of university faculties. In so doing, the very significant responsibilities of the department head in the determination of issues pertaining to hiring, promotion and discipline of faculty members as well as the general operation of the department would impel a finding of managerial status.

4. I would have found the "department head" to have been a managerial person under section 1(3)(b) of the Act.









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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1977

### BARGAINING AGENTS CERTIFIED DURING APRIL

#### No Vote Conducted

**1017-76-R:** Ontario Nurses' Association (Applicant) v. St. Joseph's Hospital, Brantford (Respondent).

Unit #1: "all lay registered and graduate nurses employed by the respondent in a nursing capacity in Brantford, Ontario, save and except head nurse and/or supervisor, persons above the rank of head nurses and/or supervisor and persons regularly employed for not more than twenty-four hours per week." (45 employees in the unit).

Unit #2: "all lay registered and graduate nurses employed by the respondent in a nursing capacity for not more than twenty-four hours per week in Brantford, Ontario, save and except head nurse and/or supervisor, persons above the rank of head nurse and/or supervisor." (24 employees in the unit).

**1899-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Rank Construction Limited (Respondent) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #1) v. General Contractors' Section of the Toronto Construction Association (Intervener #2).

Unit: "all cement masons and cement mason's apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering, in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

**1928-76-R:** Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Bestview Holdings Limited (Respondent).

Unit: "all registered nurses employed by the respondent in Oshawa, save and except supervisors and persons above the rank of supervisor." (7 employees in the unit). (*Having regard to the foregoing*).

**1958-76-R:** Retail, Wholesale and Department Store Union, AFL: CIO: CLC (Applicant) v. Weston Bakeries Limited (Respondent).

Unit #1: "all employees of the respondent at Kirkland Lake, save and except foremen and/or supervisors, persons above the rank of foreman and/or supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (33 employees in the unit).

(*Bargaining Unit #2 – See Application Certified Subsequent to Post-Hearing Vote*).

**1968-76-R:** Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Hard-Rock Paving Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent engaged in its road building operations in the Regional Municipality of Niagara, save and except foremen, persons above the rank of foreman, office and sales staff." (19 employees in the unit).

**2028-76-R:** United Steelworkers of America (Applicant) v. Courtice Specialty Steels Ltd. (Respondent).

Unit: "all employees of the respondent at Bowmanville, save and except foremen, persons above the rank of foreman, office and sales staff." (no employees in the unit). (*Having regard to the above*). (*clarity note – see Report of full decision [1977] OLRB Rep. April*).

**2046-76-R:** Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C. (Applicant) v. Kitchener-Waterloo Stockyards Limited (Respondent) v. Group of Employees (Objectors).

Unit: "All employees of the respondent employed in Waterloo, Ontario, save and except foremen and persons regularly above the rank of foreman, office staff, sales staff, persons regularly employed for not more than 24 hours per week and students." (57 employees in the unit). (*Pursuant to the agreement of the parties*). (*clarity note – see Report of full decision [1977] OLRB Rep. April*).

**2072-65-R:** United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Wylain Canada Ltd. (Respondent).

Unit: "all employees of the respondent in the City of Brampton save and except foremen, those above the rank of foreman, office and sales staff and students employed during the school vacation period." (41 employees in the unit).

**2109-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. 308182 Ontario Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 700 and 730 Ontario Street, Toronto, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (5 employees in the unit). (*Having regard to the agreement of the parties*).

**2119-76-R:** The Association of Allied Health Professionals: Ontario (Applicant) v. St. Mary's of the Lake Hospital, Kingston, Ontario (Respondent) v. St. Mary's of the Lake Hospital Employees Association (Intervener).

Unit: "all Lay Para Medical employees of the respondent at Kingston, save and except supervisors and those persons above the rank of supervisor, persons covered by subsisting collective agreements, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (17 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision [1977] OLRB Rep. April*).

**2121-76-R:** United Brotherhood of Carpenters and Joiners of America Local Union 93 (Applicant) v. J. C. Sulphur Construction Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit).

**2122-76-R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Dustbane Enterprises Limited, Modern Building Cleaning Division (Respondent).

Unit: "all employees of the respondent at Sarnia Genral Hospital, Sarnia, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and office staff." (8 employees in the unit). (*having regard to the agreement of the parties*).

**2123-76-R:** Labourers' International Union of North America, Local 1036 (Applicant) v. Firestone Stores (Respondent).

Unit #1: "all employees of Firestone Canada Ltd., 826 Queen Street East, Sault Ste. Marie, Ontario, save and except the store manager, credit manager, service manager, office clerical and sales personnel, and students employed during school vacation periods." (7 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of Firestone Canada Ltd., 10 Government Road, Wawa, Ontario, save and except supervisors and those above the rank of supervisor." (2 employees in the unit). (*Having further regard to the agreement of the parties*).

**2124-76-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Olsonite Manufacturing Limited (Respondent).

Unit: "all office and clerical employees of the respondent at Windsor, save and except supervisors, those above the rank of supervisor, sales representatives, assistant production control supervisor, and quality control inspectors, receptionist/personnel secretary." (3 employees in the unit). (*Having regard to the agreement of the parties*).

**2140-76-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Merchandise Warehousing & Packaging (Respondent).

Unit: "all employees of the Respondent in Brantford, Ontario save and except Supervisors, Persons above the rank of Supervisor, Office and Sales Staff." (8 employees in the unit). (*Having regard to the agreement of the parties*).

**2141-76-R:** The Canadian Union of Public Employees (Applicant) v. Ross Memorial Hospital (Respondent).

Unit: "all employees of the respondent at Lindsay, regularly employed for not more than 24 hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, undergraduate dieticians, student dieticians, technical personnel, supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements." (84 employees in the unit). (*clarity note* – see Report of full decision [1977] OLRB Rep. April).

**2142-76-R:** Christian Labour Association of Canada (Applicant) v. Tecumseth Insulation Services Limited (Respondent).

Unit: "all insulation mechanics and insulation mechanics' apprentices employed by the respondent in Prince Edward County and the Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).



**2145-76-R:** Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Association (Applicant) v. St. Michael's Shops of Canada Limited (Operating as Marks and Spencer) (Respondent).

Unit #1: "all employees of the Respondent working at or out of its warehouse premises in Mississauga, Ontario, save and except supervisors and persons above the rank of supervisor, office and sales employees, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods." (50 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the Respondent employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods working at or out of its warehouse premises in Mississauga, Ontario, save and except supervisors and persons above the rank of supervisor, office and sales employees." (18 employees in the unit). (*Having regard to the agreement of the parties*).

**2153-76-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Sternson Limited (Respondent).

Unit: "all employees of the respondent in Brantford, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons employed in the laboratory and students employed during the school vacation period." (23 employees in the unit). (*Having regard to the agreement of the parties*).

**2154-76-R:** The Workers Union of Queen Elizabeth Hospital (C.N.T.U.) (Applicant) v. VS Services Limited (Respondent).

Unit #1: "all employees of the respondent in the Dietary Department at the Ontario Crippled Children's Centre, Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, dietitians, student dietitians, chef, office staff and persons regularly employed for not more than twenty-four hours per week." (12 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in the Dietary Department at the Ontario Crippled Children's Centre who are regularly employed for not more than 24 hours per week save and except supervisors, persons above the rank of supervisor, dietitians, student dietitians office staff and persons covered by the Board's certificate dated April 13, 1977." (12 employees in the unit). (*Having regard to the agreement of the parties*).

**2159-76-R:** United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC (Applicant) v. Regency Manor (Respondent).

Unit: "all employees of the respondent within the Municipality of Port Hope save and except registered nurses, office staff, supervisors, persons above the rank of supervisor and students employed during the school vacation period." (34 employees in the unit). (*Having regard to the agreement of the parties*).

**2160-76-R:** Labourers' International Union of North America, Oil and Gas Technicians, Service, Domestic and General Workers Local 1267 (Applicant) v. Armbrø Waste Management (a Division of Armbrø Materials & Construction Ltd.) (Respondent).

Unit: "all employees of the respondent working within the Counties of York, Peel, Halton and Ontario (except the Townships of Rama, Mara and Thorah) save and except foremen and dispatchers, persons above the rank of foreman and dispatcher, laboratory technicians, office and sales staff and

students employed during the school vacation period.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

**2174-76-R:** Service Employees Union, Local 210, affiliated with Service Employees International Union AFL-CIO-CLC (Applicant) v. Christian Care Centres of Leamington Ltd. operating, Leamington Nursing Home (Respondent).

Unit: “all employees of the respondent in Leamington, regularly employed for not more than twenty-four hours per week, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, activities directors, office staff, persons covered by subsisting collective agreements and students employed during the school vacation period.” (33 employees in the unit).

**2179-76-R:** International Leather Goods, Plastics & Novelty Workers’ Union (Affiliated with A.F. of L. – C.I.O. & C.L.C.) (Applicant) v. Skyway Luggage Co. of Canada Ltd. (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto save and except foremen, foreladies, persons above the rank of foreman or forelady, office, advertising and sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

**2201-76-R:** London and District Service Workers’ Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Tillsonburg District Memorial Hospital (Respondent) v. International Union of Operating Engineers, Local 772 (Intervener).

Unit: “all employees of Tillsonburg District Memorial Hospital at its hospital at Tillsonburg regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except professional graduate pharmacists, undergraduate pharmacists, graduate dietitians, technical personnel, supervisors, persons above the rank of supervisor, office staff, and persons covered by a collective agreement between the International Union of Operating Engineers and Tillsonburg District Memorial Hospital.” (37 employees in the unit).

**2203-76-R:** Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Taylor Plumbing & Heating (Respondent).

Unit: “all plumbers and plumbers’ apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Having regard to the foregoing*).

**0006-77-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Strongway Construction Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

**0008-77-R:** Canadian Paperworkers Union (Applicant) v. International Wallcoverings, A Division of International Paints (Canada) Limited (Respondent).

Unit: "all employees of the respondent in Bramalea, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (61 employees in the unit). (*Having regard to the agreement of the parties*).

**0010-77-R:** United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Simmons Limited (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Peel save and except foremen, persons above the rank of foreman, office and sales staff." (208 employees in the unit). (*Having regard to the agreement of the parties*).

**0011-77-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Lanark Furniture (1969) Limited (Respondent).

Unit: "all employees of the respondent at 250 Supertest Road, Downsview, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during a school vacation period." (71 employees in the unit). (*Having regard to the agreement of the parties*).

**0017-77-R:** Oil, Chemical & Atomic Workers International Union (Applicant) v. Burmah-Castrol Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at its plant at 3360 Lakeshore Blvd. West, Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and laboratory staff." (29 employees in the unit). (*Having regard to the agreement of the parties*).

**0018-77-R:** Service Employees Union, Local 204 (Applicant) v. Kilean Lodge Incorporated (Respondent).

Unit: "all employees employed by Kilean Lodge Incorporated, Grimsby, in the County of Lincoln, save and except Professional Nursing Staff, Physiotherapists, Occupational Therapists, Supervisors, Foremen, persons above the rank of supervisor or foremen, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (17 employees in the unit). (*Having regard to the agreement of the parties*).

**0038-77-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. H. G. Susgin Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in The Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**0051-77-R:** Lumber & Sawmill Workers' Union Local 2693, of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Clow Darling Plumbing & Heating Co. Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**0073-77-R:** Labourers' International Union of North America, Local 183 (Applicant) v. G. Hanna Limited (Respondent).



Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**0074-77-R:** Christian Labour Association of Canada (Applicant) v. Simcoe Mechanical Contracting Limited (Respondent).

Unit: "all plumbers and plumbers' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

**0092-77-R:** Labourers' International Union of North America, Local 607 (Applicant) v. Mobile Western Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**0099-77-R:** Sheet Metal Workers' International Association Local Union #30 (Applicant) v. Rapid Refrigeration Mftg. Company Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (36 employees in the unit).

## Applications Certified Subsequent to Pre-Hearing Vote

**1953-76-R:** Canadian Chemical Workers Union (Applicant) v. Pfizer Company Limited, La Compagnie Pfizer Ltée (Respondent) v. International Chemical Workers Union and its Local 768 (Intervener).

Unit: "all employees of the respondent at Cornwall, save and except foremen, those above the rank of foreman, laboratory, office and clerical staff." (61 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		60
Number of persons who cast ballots		54
Number of ballots marked in favour of applicant	52	
Number of ballots marked in favour of intervener	2	

**1985-76-R:** Canadian Chemical Workers Union (Applicant) v. Dupont of Canada Limited, Maitland Works (Respondent) v. International Chemical Workers Union, Local 536 (Intervener).

Unit: "all employees of Du Pont Canada Limited at its Maitland Works except those engaged wholly or partially in a supervisory capacity, engineering, technical and medical staff, office employees and guards." (623 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		617
Number of persons who cast ballots	536	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	473	
Number of ballots marked in favour of intervener	62	

**2033-76-R:** International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Pisa Contractors (Respondent) v. Marble Masons, Tile Layers and Terrazzo Workers Union No. 31, affiliated with the Bricklayers, Masons and Plasterers International Union of America (Intervener).

Unit: "all plasterers and plasterers' apprentices in the employ of Pisa Contractors in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (23 employees in the unit).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant	19	
Number of ballots marked in favour of intervener	3	

**2105-76-R:** Canadian Chemical Workers' Union (Applicant) v. Somerville Industries Limited (Respondent) v. International Chemical Workers' Union, Local 817 (Intervener #1) v. International Chemical Workers' Union (Intervener #2) v. Graphic Arts International Union, Local 517 (Intervener #3).

Unit: "all employees in the Company at its London Division, save and except office staff, factory clerks, pressmen, assistants and apprentices in the Printing Press Room and Cut and Crease Department of the Company, those engaged in lithography operations, security guards, foremen, assistant foremen, and any employees above the rank of foreman." (220 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		198
Number of persons who cast ballots	171	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	124	
Number of ballots marked in favour of intervener	46	

**2115-76-R:** International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Spring Plastering Co. Limited (Respondent) v. Marble Masons, Tile Layers and Terrazzo Workers Union No. 31, affiliated with the Bricklayers, Masons and Plasterers International Union of America (Intervener).

Unit: "all plasterers and plasterers' apprentices in the employ of Spring Plastering Co. Limited in Metropolitan Toronto, The Regional Municipality of York, The Regional Municipality of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Town of Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant	7	
Number of ballots marked in favour of intervener	1	

**2116-76-R:** International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Norsan Construction Limited (Respondent) v. Marble Masons, Tile Layers and Terrazzo Workers Union No. 31, affiliated with the Bricklayers, Masons and Plasterers International Union of America (Intervener).

Unit: "all plasterers and plasterers' apprentices in the employ of Norsan Construction Limited in Metropolitan Toronto, The Regional Municipality of York, The Regional Municipality of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Town of Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant	5	
Number of ballots marked in favour of intervener	0	

## Application Certified Subsequent to Post-Hearing Vote

**1958-76-R:** Retail, Wholesale and Department Store Union, ALF: CIO :CLC (Applicant) v. Weston Bakeries Limited (Respondent).

Unit #2: "all employees of the respondent at Kirkland Lake regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except foremen and/or supervisor, persons above the rank of foreman and/or supervisor, and office staff." (6 employees in the unit).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	1	

*(Bargaining Unit #1 – See Bargaining Units Certified – No Vote Conducted).*

## APPLICATIONS FOR CERTIFICATION DISMISSED

### No Vote Conducted

**0952-76-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Ontario Paving Div. of Giuseppe Alfano & Sons Ltd. (Respondent). (17 employees).



**1333-76-R:** Local #124, Operative Plasterers and Cement Masons International Association of the United States and Canada, Ottawa, Hull (Applicant) v. Bellai Freres Ltee – Bros. Ltd. (Respondent) v. Labourers' International Union of North America, Local 527 (Intervener). (3 employees).

**1651-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Teskey Construction Company Limited (Respondent). (72 employees).

**1867-76-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 800 (Applicant) v. Arcan Plumbing & Heating Ltd. (Respondent).

Unit: "all plumbers, steamfitters, gas fitters, welders and apprentices thereof in the employ of the respondent within the Ontario Labour Relations Geographical Area #17, Sudbury, Ontario, save and except all those above the rank of working foreman." (4 employees in the unit). (*Having regard to the agreement of the parties*).

**2017-76-R:** Calvin Golbeck (Applicant) v. Sheet Metal Workers' International Association, Local Union No. 562 (Respondent) v. S. E. Rozell & Sons Limited (Intervener). (6 employees).

**2057-76-R:** United Cement Lime & Gypsum Workers International Union (Applicant) v. Misener Beverages Ltd. (Respondent) v. Group of Employees (Objectors). (37 employees).

**2180-76-R:** Amalgamated Clothing and Textile Workers Union Toronto Joint Board (Applicant) v. David S. Reid Limited (Respondent). (159 employees).

## Certification Dismissed Subsequent to Pre-Hearing Vote

**2000-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Structural Formwork Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Intervener #1) v. Labourers' International Union of North America, Local 506 (Intervener #2) v. The General Contractors' Section of The Toronto Construction Association (Intervener #3).

Voting Constituency: "All cement masons and their apprentices in the employ of Structural Formwork Limited engaged in cement finishing work in the industrial, commercial and institutional sector of the construction industry in Metropolitan Toronto, The Regional Municipality of York and The County of Peel, and the Township of Esquesing and the Towns of Oakville and Milton, in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots		3
Number of ballots marked in favour of applicant	0	
Number of ballots marked in favour of intervener #1	3	

**2061-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Pigott Construction Limited (Respondent) v. Operative Plasterers and Cement Masons International Association Local 598 (Intervener #1) v. The General Contractors' Section of The Toronto Construction Association (Intervener #2).

Voting Constituency: "All cement masons and their apprentices in the employ of Pigott Construction Limited engaged in cement finishing work in the industrial, commercial and institutional sector of the construction industry in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots		8
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	0	
Number of ballots marked in favour of intervener # 1	7	

**2066-76-R:** Amalgamated Clothing & Textile Workers Union (Applicant) v. Fromm Bros. Limited (Respondent).

Voting Constituency: "All employees of the respondent at its plant in Cambridge, Ontario, save and except foremen, foreladies, persons above the rank of foreman, forelady, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (107 employees).

Number of names of persons on list as originally prepared by employer		101
Number of persons who cast ballots		90
Number of ballots marked in favour of applicant	41	
Number of ballots marked against applicant	49	

**2074-76-R:** United Steelworkers of America (Applicant) v. Star Steel Ltd. (Respondent) v. Canadian Workers Union (Intervener).

Voting Constituency: "All employees of the Respondent at Milton, Ontario save and except Foremen, persons above the rank of foreman, Office and Sales Staff, Students employed during the School Vacation period and persons employed for twenty-four hours per week or less." (59 employees).

Number of names of persons on list as originally prepared by employer		59
Number of persons who cast ballots		56
Number of ballots marked in favour of applicant	16	
Number of ballots marked in favour of intervener	40	

## Certification Dismissed Subsequent to Post-Hearing Vote

**2108-76-R:** United Garment Workers of America (Applicant) v. Avon Sportwear (Respondent).

Unit: "all employees of the respondent at Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman, forelady, office staff and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (330 employees in the unit).

Number of names of persons on revised voters' list		319
Number of persons who cast ballots	289	
Ballots segregated and not counted	1	
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	110	
Number of ballots marked against applicant	176	

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**1980-76-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Armbró Materials and Construction Ltd., Armbró Holdings Ltd. (Respondent). (2 employees).

**2071-76-R:** Beclawat (Ontario) Limited Employees Association (Applicant) v. Beclawat (Ontario) Limited (Respondent). (22 employees).

**2129-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Strongway Construction Ltd. (Respondent). (2 employees).

**2131-76-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Strongland Construction Ltd. (Respondent). (2 employees).

**2208-76-R:** Labourers' International Union of North America, Local 491 (Applicant) v. Newman Bros. Co. Limited (Respondent). (2 employees).

**2210-76-R:** Retail Wholesale & Department Store Union Representatives Association of Ontario (Applicant) v. Retail Wholesale & Department Store Union AFL:CIO:CLC - Local 414 (Respondent). (11 employees).

**0061-77-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Continental Concrete Finishing Limited (Respondent) v. The General Contractors' Section of the Toronto Construction Association (Intervener #1) v. Local 598 of the Operative Plasterers and Cement Masons International Association of the United States and Canada (Intervener #2). (8 employees).

**0075-77-R:** Labourers' International Union of North America, Local 506 (Applicant) v. White Bay Mechanical (Respondent). (2 employees).

**0088-77-R:** United Brotherhood of Carpenters & Joiners of America (Applicant) v. Doma's Custom Furniture Co. Ltd. (Respondent). (20 employees).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1266-76-R:** Jacob T. Eitel (Applicant) v. Canadian Union of Public Employees (Respondent) v. Milbrun Holdings Limited, carrying on business as Preston Springs Gardens (Intervener). (*Granted*).



Unit: "all employees of Milbrun Holdings Limited, carrying on business as Preston Springs Gardens, at Preston Springs Gardens, at Cambridge, Ontario, save and except Professional and Medical Staff, Supervisors, persons above the rank of Supervisor, Technical Personnel, Office Staff, and students employed during the school vacation period." (36 employees in the unit).

Number of names of persons on list as originally prepared by employer		39
Number of persons who cast ballots	33	
Number of ballots marked in favour of respondent	15	
Number of ballots marked against respondent	18	

**1750-76-R:** Sidney Brenner (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Catalano Produce Limited (Intervener). (*Granted*).

Unit: "all employees of the intervener employed at Windsor, Ontario, save and except foremen, persons above the ranks of foremen, office and sales staff." (9 employees in the unit).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	6	
Number of ballots marked in favour of Respondent	2	
Number of ballots marked against Respondent	4	

**1752-76-R:** Alfred Herniman, Dianne Tousignant and Josephine Sansotta (Applicants) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Twin Pines Dairy Co. Ltd. (Intervener). (*Granted*).

Unit: "all office and clerical employees of Twin Pines Dairy Co. Ltd. at Windsor, Ontario, save and except supervisors and persons above the rank of supervisor." (3 employees in the unit).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	3	

**1762-76-R:** Rahim A. Siraj (Applicant) v. Local Lodge 2506 International Association of Machinist and Aerospace Workers (Respondent). (*Granted*).

Unit: "all employees of Ralph Milrod Metal Products Limited at Mississauga save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (184 employees in the unit).

Number of names of persons on revised voters' list		195
Number of persons who cast ballots	177	
Number of spoiled ballots	10	
Number of ballots marked in favour respondent	21	
Number of ballots marked against respondent	146	

**1788-76-R:** Suzanne M. Buchanan (Applicant) v. Office and Clerical Workers, Local #31 International Molders & Allied Workers Union (Respondent) v. Hobart Brothers of Canada Limited (Intervener). (*Granted*).

Unit: "all employees of the intervener employed at Woodstock, Ontario, save and except foremen and supervisors, persons above the rank of foremen and supervisors, sales persons, technicians, technologists, confidential secretary to the vice-President, confidential secretary to the Manager of Finance and Administration, students employed during the school vacation period, and those employees covered by a Certificate of the Board to International Molders and Allied Workers Union dated February 15, 1974, pursuant to the Certificate issued by the Ontario Labour Relations Board, dated August 23, 1974, In Woodstock, Ontario." (7 employees in the unit).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	6	

**1911-76-R:** James Shaw (Applicant) v. International Union of Operating Engineers, Local 772, A.F.L.-C.I.O.-C.L.C. (Respondent) v. Cities Service Chemicals Limited (Intervener). (*Granted*).

Unit: "all employees of Cities Service Chemicals, Ltd., Columbian Division, at Hamilton, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (66 employees in the unit).

Number of names of persons on revised voters' list		65
Number of persons who cast ballots	60	
Number of ballots marked in favour of respondent	13	
Number of ballots marked against respondent	47	

**1992-76-R:** Clive S. Desjardins (Applicant) v. International Brotherhood of Electrical Workers, Local Union 353 (Respondent) v. Benda Electric and Construction Limited (Intervener). (1 employee). (*Dismissed*).

**2018-76-R:** Paul Treneer (Applicant) v. Retail Clerk's Union, Local 486 (Respondent) v. Kingston Vending Limited (Intervener). (*Granted*).

Unit: "all employees of Kingston Vending Limited at 20 Harvey Street, Kingston, Ontario, save and except supervisors, persons above the rank of supervisor, the Secretary to the General Manager and students employed during the school vacation period." (24 employees in the unit).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots	16	
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	15	

**2125-76-R:** Ralph Ford Electrical Contractors Limited (Applicant) v. International Brotherhood of Electrical Workers Local 804 (Respondent). (no employees). (*Withdrawn*).

**2198-76-R:** Aeroquip (Canada) Limited, Perth, Ontario (Applicant) v. International Molders' and Allied Workers Union (Respondent). (45 employees). (*Terminated*).

## APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

**1773-76-R:** Local Union 636 – International Brotherhood of Electrical Workers, AFL-CIO-CLC (Applicant) v. Deseronto Public Utilities Commission (Respondent) v. Local Union 1678 International Brotherhood of Electrical Workers (Predecessor Trade Union). (*Granted*).

**2161-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. Town of Belle River Waterworks Department (Respondent). (*Granted*).

**2162-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. The Windsor Utilities Commission (Respondent). (*Granted*).

**2163-76-R:** Local 636 International Brotherhood of Electrical Workers (Applicant) v. Belle River Hydro Electric Commission (Respondent). (*Granted*).

**2164-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. Public Utilities Commission of the Town of Amherstburg (Respondent). (*Granted*).

**2165-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. Amherstburg, Anderdon & Malden Water Pollution Control Board (Respondent). (*Granted*).

**2166-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. Harrow Hydro Electric Commission (Respondent). (*Granted*).

**2167-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. The Metropolitan General Hospital (Respondent). (*Granted*).

**2168-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. Windsor/Tecumseh Joint Waterworks Board (Respondent). (*Granted*).

**2169-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. The Windsor Utilities Commission (Respondent). (*Granted*).

**2170-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. The Corporation of the Town of Amherstburg (Respondent). (*Granted*).

**2171-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. Wallaceburg Hydro Electric Commission (Respondent). (*Granted*).

**2172-76-R:** Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. Township of Malden (Respondent). (*Granted*).

**0046-77-R:** United Steelworkers of America (Applicant) v. Dahlstrom of Canada Limited (Respondent). (*Granted*).



## APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

**1568-76-U:** Libby, McNeill & Libby of Canada, Limited (Applicant) v. United Automobile, Aerospace & Agricultural Implement Workers of America and others as listed on attached page (Respondent). (*Dismissed*).

**2118-76-U:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Labourers International Union, Local 183 (Respondent). (*Withdrawn*).

**0043-77-U:** Maurice H. Rollins Construction Limited (Applicant) v. International Union of Bricklayers and Allied Craftsmen, Local 10; International Union of Bricklayers and Allied Craftsmen, Local 30; and M. Quesnel (Respondents). (*Withdrawn*).

**0062-77-U:** Victor Construction Limited (Applicant) v. Ignazio Romualdi, Mike Malfa, Joseph Hiebert, Armand Jurisevic, Benito Pighin Henry Sich, Pietro Vultaggio, Austin Roberts, Vincenzo Barberi, Rocco Renna, Francesco Scarpelli, Giuseppe Gemmiti (Respondents). (*Withdrawn*).

**0103-77-U:** Galt Metal Industries Limited (Applicant) v. Joao Andrade, Hector Blackmore, Winifred L. Brown, and those persons named in Schedule "A" attached hereto (Respondents). (*Withdrawn*).

## APPLICATION FOR CONSENT TO PROSECUTE

**1995-76-U:** Tantalus Construction Company Limited (Applicant) v. Mr. Arthur J. Varty (Respondent). (*Dismissed*).

## COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

**0227-76-U:** Oil, Chemical and Atomic Workers International Union Local 9-593 (Complainant) v. Texaco Canada Limited (Respondent). (*Withdrawn*).

**0235-76-U:** Oil, Chemical and Atomic Workers International Union, Local 9-593 (Complainant) v. Texaco Canada Limited (Respondent). (*Withdrawn*).

**1441-76-U:** Walter Lumsden (Complainant) v. Coca-Cola Ltd. (Respondent).  
- and -

**1442-76-U:** Walter Lumsden (Complainant) v. Coca-Cola Ltd. (Respondent).  
- and -

**1443-76-U:** Walter Lumsden (Complainant) v. Coca-Cola Ltd. (Respondent).  
- and -

**1445-76-U:** Walter Lumsden (Complainant) v. Coca-Cola Ltd. (Respondent). (*Granted*).

**1761-76-U:** P. Holmes (Complainant) v. Rowntree Mackintosh Canada Ltd. and Retail, Wholesale, Bakery and Confectionery Workers Union, Local 461 (Respondents). (*Dismissed*).

**1813-76-U:** Richard John Collyer (Complainant) v. Addressograph Multigraph of Canada Limited (Respondent). (*Dismissed*).

**1847-76-U:** Oil, Chemical & Atomic Workers International Union, Local 9-593 (Complainant) v. Texaco Canada Limited (Respondent). (*Dismissed*).

**1902-76-U:** Robert D. Seguin (Complainant) v. United Steelworkers of America, Local 2251 (Respondent) v. The Algoma Steel Corporation, Limited (Intervener). (*Withdrawn*).

**1996-76-U:** Tantalus Construction Company Limited (Complainant) v. Mr. Arthur J. Varty (Respondent). (*Dismissed*).

**2048-76-U:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) (Complainant) v. Inglis Limited (Respondent). (*Withdrawn*).

**2049-76-U:** United Garment Workers of America (Complainant) v. Avon Sportswear (Respondent). (*Withdrawn*).

**2062-76-U:** Teamsters Union Local 938, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Harkema Forwarders Limited (Respondent). (*Withdrawn*).

**2063-76-U:** Teamsters Union Local 938, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Harkema Forwarders Ltd. (Respondent). (*Withdrawn*).

**2084-76-U:** Hotel & Restaurant Employees & Bartenders International Union, AFL, CIO, CLC (Complainant) v. Pig & Whistle Inn (Respondent). (*Terminated*).

**2089-76-U:** International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employee's and Bartenders' International Union, A.F.L.-C.I.O.-C.L.C. (Complainant) v. Georgian Motor Hotel (Oshawa) Limited (Respondent). (*Withdrawn*).

**2099-76-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. N-J Spivak Limited (Respondent). (*Withdrawn*).

**2117-76-U:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (Complainant) v. Labourers International Union, Local 183 and George Wimpey Canada Limited (Respondents). (*Withdrawn*).

**2126-76-U:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Complainant) v. Olsonite Manufacturing Limited (Respondent). (*Withdrawn*).

**2139-76-U:** International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union. AF of L., C.I.O.-C.L.C. (Complainant) v. The Seaway Hotels (Ontario) Limited (Respondent). (*Withdrawn*).

**2149-76-U:** Phyllis Lee (Complainant) v. Sandra Instant Coffee Company Limited (Respondent) v. Bakery & Confectionery Workers' International Union (Intervener). (*Withdrawn*).

**2150-76-U:** Canadian Paperworkers Union (Complainant) v. Planet Paper Box Ltd. (Respondent). (*Withdrawn*).

**2181-76-U:** Canadian Paperworkers Union (Complainant) v. Lawson Graphics Printing Specialties and Paper Products Union Local 446 (Respondents). (*Dismissed*).

**2187-76-U:** Maurice N. Burke (Complainant) v. Ronald Francis Elan Tool & Die (Respondent). (*Withdrawn*).

**2188-76-U:** Matthew A. Heeley (Complainant) v. United Steelworkers of America, and United Steelworkers of America, Local 6519 (Respondent). (*Withdrawn*).

**2202-76-U:** Canadian Union of Public Employees, Local 107 (Complainant) v. The Corporation of the Township of London (Respondent). (*Withdrawn*).

**0003-77-U:** Donald Manning (Complainant) v. The Distillery, Rectifying, Wine and Allied Workers' International Union of America, Local 48 (Respondent) v. Joseph E. Seagram & Sons, Limited (Intervener). (*Withdrawn*).

**0021-77-U:** B. Drent (Complainant) v. M. Roesler (Respondent). (*Withdrawn*).

**0033-77-U:** The Canadian Union of Public Employees (Complainant) v. The Fountain View Gardens Nursing Home (Respondent). (*Withdrawn*).

**0063-77-U:** Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Steinmans Transport Ltd. (Respondent). (*Withdrawn*).

**0148-77-U:** Claudio Caceres (Complainant) v. Casselman Company Limited (Respondent). (*Withdrawn*).

## APPLICATIONS UNDER SECTION 55

**1929-76-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Thames Valley Beverages Ltd. (Respondent). (*Withdrawn*).

**1961-76-R:** Teamsters, Local Union No. 230, Ready-Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Applicant) v. Dennis Moran Limited; Dennis Moran (Barrie) Limited (Respondent). (*Granted*).

**2010-76-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v.



Canada Building Materials Company (Respondent) v. Matthews Group Limited (Intervener). (*Granted*).

**2055-76-R:** Canadian Food and Allied Workers Local Union 725, Chartered by The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Zehrmart Limited and G. Tamblyn Limited (Respondents). (*Granted*).

## **APPLICATION FOR DETERMINATION UNDER SECTION 95(2)**

**2019-76-M:** Ontario Public Service Employees Union and its Local 619 (Applicant) v. Sudbury Memorial Hospital (Respondent). (*Terminated*).

## **APPLICATIONS UNDER SECTION 112A**

**1682-76-M:** Ontario Allied Construction Trades Council (Applicant) v. The Electrical Power Systems Construction Association (Respondent). (*Dismissed*).

**1734-76-M:** United Brotherhood of Carpenters and Joiners of America, Local 38 (Applicant) v. D. L. Stephens Contracting Niagara Ltd., Stephens and Bass Ltd. (Respondent). (*Dismissed*).

**1791-76-M:** Local 800 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Spiers Brothers Limited (Respondent). (*Dismissed*).

**1842-76-M:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Electrical Contractors' Association of Toronto and Kroman's Electric Limited (Respondent). (*Terminated*).  
1962-76-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. General Contractors' Section of the Toronto Construction Association and Michael Wade Construction Co. Limited (Respondents). (*Granted*).

**1988-76-M:** International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Speed Drywall Limited and The Interior Systems Contractors Association of Ontario (Respondents).

- and -

**1991-76-M:** International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Ben Plastering Limited, c.o.b. as Belmont Plastering Co. (Respondent). (*Granted*).

**1990-76-M:** International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. A.L.C. Interior Systems Inc. and The Interior Systems Contractors Association of Ontario (Respondents). (*Withdrawn*).

**2112-76-M:** Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 598 (Applicant) v. Cross Country Floors Limited (Respondent). (*Granted*).

**2127-76-M:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Gav-Bar Holdings Limited (Respondent). (*Withdrawn*).

**2192-76-M:** International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Electrical Contractors Association of Toronto, Jade Electric Ltd. and Lash Electric Ltd. (Respondents).

**0019-77-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Northview Plumbing Limited and The Metropolitan Plumbing and Heating Contractors Association, A Division of the Mechanical Contractors Association of Toronto (Respondents). (*Withdrawn*).

**0023-77-M:** United Brotherhood of Carpenters and Joiners of America Local Union 93 (Applicant) v. Doorways Limited (Respondent). (*Withdrawn*).

**0034-77-M:** International Brotherhood of Electrical Workers Local 353 (Applicant) v. Karl Bunder and Sons (Respondent). (*Withdrawn*).

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**0241-76-R:** Labourers' International Union of North America, Local Union #493 (Applicant) v. Winson Construction Limited (Respondent) v. Group of Employees (Objectors). (*Request Denied*).

**0496-76-U:** Labourers' International Union of North America, Local 493 (Complainant) v. Winson Construction Limited, Hans Wintjes and Henry Lavign (Respondents). (*Request Denied*). (*Section 79*).

**STATISTICAL TABLES FOR THE 4th QUARTER  
January to March 1977 and  
FISCAL YEAR 1976-77**

**ONTARIO LABOUR RELATIONS BOARD  
DECISIONS MARCH 77**

TABLE 1. Applications and Complaints Filed with the Ontario Labour Relations Board.

TABLE 2. Hearings of the Ontario Labour Relations Board.

TABLE 3. Applications and Complaints Disposed of by the Ontario Labour Relations Board by Major Types.

TABLE 4. Applications Disposed of by the Ontario Labour Relations Board by Type and Disposition.

TABLE 5. Representation Votes in Certification Applications Disposed of by the Ontario Labour Relations Board.

TABLE 6. Representation Votes in Certification Applications Disposed of by the Ontario Labour Relations Board.



TABLE 1.

**APPLICATIONS AND COMPLAINTS FILED  
WITH THE ONTARIO LABOUR RELATIONS BOARD**

	Number Filed		
	4th Quarter (Jan – Mar) 1976-77	Fiscal Year	
		1976-77	1975-76 R.
1. Certification	228	1029	1123
2. Declaration Termination of Bargaining Rights	24	84	64
3. Declaration of Successor Trade Union or Employer	31	70	32
4. Declaration of Common Employer Status	—	7	7
5. Accreditation of Employer Organization	2	2	5
6. Declaration of Unlawful Strike	—	11	46
7. Declaration of Unlawful Lock-Out	1	7	2
*8. Direction Respecting Unlawful Strike or Lock-Out	18	90	56
9. Consent to Prosecute	7	77	128
10. Complaints Respecting a Contravention of the Act (Sec. 79)	119	460	304
**11. Miscellaneous	70	368	185
TOTAL	<u>500</u>	<u>2205</u>	<u>1952</u>

R. 1975-76 figures revised.

\*Direction respecting unlawful strike or lock-out is comprised of:

- a) Section 123
- b) Section 82
- c) Section 83
- d) Section 63 – Colleges Collective Bargaining Act

\*\*Miscellaneous is comprised of:

- a) Section 37
- b) Section 39
- c) Section 44(3)
- d) Section 76
- e) Section 81
- f) Section 95(2)
- g) Section 96
- h) Section 112(a)

**TABLE 2.**  
**HEARINGS OF THE ONTARIO LABOUR RELATIONS BOARD**

	Number Filed		
	4th Quarter (Jan – Mar) <u>1976-77</u>	Fiscal Year	
		<u>1976-77</u>	<u>1975-76</u>
1. Hearings and Continuations of Hearings by the Board	337	1577	1358
<hr/> October to December – 1976			

**TABLE 3.**  
**APPLICATIONS AND COMPLAINTS DISPOSED OF  
BY THE ONTARIO LABOUR RELATIONS BOARD BY MAJOR TYPES**

	Number Disposed of		
	4th Quarter (Jan – Mar) <u>1976-77</u>	Fiscal Year	
		<u>1976-77</u>	<u>1975-76 R.</u>
1. Certification	224	1014	1154
2. Declaration of Termination of Bargaining Rights	22	73	70
3. Declaration of Successor Trade Union or Employer	23	51	35
4. Declaration of Common Employer Status	1	6	2
5. Accreditation of Employer Organization	0	1	9
6. Declaration of Unlawful Strike	0	3	35
7. Declaration of Unlawful Lock-Out	1	5	2
8. Direction Respecting Unlawful Strike or Lock- Out	9	56	42
9. Consent to Prosecute	5	63	91
10. Complaints Respecting a Contravention of the Act (Sec. 79)	102	400	264
11. Miscellaneous	68	280	133
R. 1975-76 figures revised.	<u>455</u>	<u>1952</u>	<u>1837</u>
TOTAL			

**TABLE 4.**

**APPLICATIONS DISPOSED OF  
BY THE ONTARIO LABOUR RELATIONS BOARD  
BY TYPE AND DISPOSITION**

	Number of Applications			Number of Employees*		
	4th Quarter	Fiscal Year		4th Quarter	Fiscal Year	
	(Jan - Mar) 1976-77	1976-77	1975-76	(Jan - Mar) 1976-77	1976-77	1975-76
I. Certification						
Granted	151	679	765	6631	20007	29330
Dismissed	42	186	222	1642	6179	10404
Withdrawn	31	149	167	305	900	3576
TOTAL	224	1014	1154	8578	27086	43310
2. Termination of Bargaining Rights						
Granted	15	45	43	544	1123	698
Dismissed	6	20	23	470	1286	634
Withdrawn	1	8	4	32	319	351
TOTAL	22	73	70	1046	2728	1683

\*These figures refer to the number of employees directly affected and are based on the number of employees in the bargaining units at the time the applications for certification were filed with the Board.



**TABLE 4.**

**APPLICATIONS DISPOSED OF  
BY THE ONTARIO LABOUR RELATIONS BOARD  
BY TYPE AND DISPOSITION (CONTINUED)**

		Number of Applications		
		4th Quarter (Jan - Mar)	Fiscal Year	
		<u>1976-77</u>	<u>1976-77</u>	<u>1975-76</u>
3.	Successor Status			
	Granted	17	40	21
	Dismissed	2	5	12
	Withdrawn	4	6	2
	TOTAL	<u>23</u>	<u>51</u>	<u>35</u>
4.	Common Employer Status			
	Granted	-	-	-
	Dismissed	-	4	2
	Withdrawn	1	2	-
	TOTAL	<u>1</u>	<u>6</u>	<u>2</u>
5.	Accreditation of Employer Organization			
	Granted	-	-	9
	Dismissed	-	1	-
	Withdrawn	-	-	-
	TOTAL	<u>-</u>	<u>1</u>	<u>9</u>
6.	Unlawful Strike			
	Granted	-	1	8
	Dismissed	-	-	7
	Withdrawn	-	2	20
	TOTAL	<u>-</u>	<u>3</u>	<u>35</u>
7.	Unlawful Lock-Out			
	Granted	-	1	-
	Dismissed	1	2	1
	Withdrawn	-	2	1
	TOTAL	<u>1</u>	<u>5</u>	<u>2</u>

TABLE 4.

**APPLICATIONS DISPOSED OF  
BY THE ONTARIO LABOUR RELATIONS BOARD  
BY TYPE AND DISPOSITION (CONTINUED)**

		Number of Applications		
		4th Quarter (Jan - Mar) 1976-77	Fiscal Year	
			1976-77	1975-76
8.	Direction Respecting Unlawful Strike or Lock-Out			
	Granted	2	20	19
	Dismissed	3	10	3
	Withdrawn	4	26	20
	TOTAL	<u>9</u>	<u>56</u>	<u>42</u>
9.	Consent to Prosecute			
	Granted	1	4	17
	Dismissed	-	14	17
	Withdrawn	4	45	57
	TOTAL	<u>5</u>	<u>63</u>	<u>91</u>
10.	Complaints under Section 79			
	Granted	9	43	18
	Dismissed	19	76	62
	Withdrawn	74	281	184
	TOTAL	<u>102</u>	<u>400</u>	<u>264</u>
11.	Miscellaneous			
	Granted	10	61	65
	Dismissed	12	38	11
	Withdrawn	46	181	57
	TOTAL	<u>68</u>	<u>280</u>	<u>133</u>

**TABLE 5.**

**REPRESENTATION VOTES IN CERTIFICATION APPLICATIONS  
DISPOSED OF  
BY THE ONTARIO LABOUR RELATIONS BOARD**

	Number of Votes		
	4th Quarter (Jan - Mar)	Fiscal Year	
		1976-77	1975-76
Certification after Vote*			
Pre-hearing Vote	15	50	77
Post-hearing Vote	3	27	64
Ballots not Counted	—	—	1
Dismissed after Vote			
Pre-hearing Vote	13	42	35
Post-hearing Vote	8	40	48
Ballots not Counted	1	2	3
<b>TOTAL</b>	<u>40</u>	<u>161</u>	<u>228</u>

\*Includes applicant-intervener applications in which both applicant and intervener apply for a new unit and either applicant or intervener is certified.

**TABLE 6.**

**REPRESENTATION VOTES IN CERTIFICATION APPLICATIONS  
DISPOSED OF  
BY THE ONTARIO LABOUR RELATIONS BOARD**

	Number of Votes		
	4th Quarter (Jan - Mar)	Fiscal Year	
		1976-77	1975-76
Respondent Union Successful*	1	1	4
Respondent Union Unsuccessful	12	31	29
<b>TOTAL</b>	<u>13</u>	<u>32</u>	<u>33</u>

\*In Termination Proceedings where a vote is taken the applicant is a group of employees or the employer; the incumbent Union is thus the Respondent.



# ONTARIO LABOUR RELATIONS BOARD

## Monthly Case Breakdown—Disposition and Comparison for April 1977 (fiscal year 1977-78)

Case Type	Applications Received		Total Disposed of		Disposed of During: April-77			Disposed of Last Quarter				
	During: April-77	Last Quarter	During: April-77	Last Quarter	Granted	Dismissed	Withdrawn	Pending	Granted	Dismissed	Withdrawn	Pending
Certification	112	228	63	224	43	11	9	235	151	42	31	186
Termination	9	24	11	22	8	2	1	17	15	6	1	19
Section 1(4)	1	-	-	1	-	-	-	7	-	-	1	6
*Successor Status	2	31	19	23	18	-	1	12	17	2	4	29
Accreditation	-	2	-	-	-	-	-	8	-	-	-	8
Unlawful Strike	-	-	-	-	-	-	-	30	-	-	-	30
Unlawful Lockout	-	1	-	1	-	-	-	2	-	1	-	2
Prosecutions	9	7	1	5	-	1	-	106	1	-	4	98
Section 79	43	119	31	102	4	5	22	165	9	19	74	153
**Declaration of Unlawful Strike or Lockout	9	18	5	9	-	1	4	62	2	3	4	58
***Misc.	27	70	15	68	5	4	6	171	10	12	46	159
Bill 139	-	-	-	-	-	-	-	-	-	-	-	-
TOTAL	212	500	145	455	78	24	43	815	205	85	165	748

\*Sections 54 and 55 are consolidated.

\*\*Sections 123, 82, 83 and 63 are consolidated.

\*\*\*Sections 37, 39, 44(3), 76, 81, 95(2), 96 and 112(a) are consolidated.

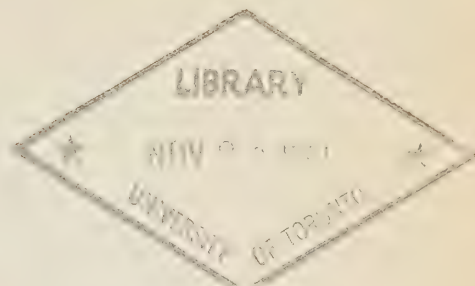
NOTE: The Pending figures found directly beside the section "Disposed of During: \_\_\_\_\_" are a consolidation of those cases received during the month and pending into the next, and the pending cases from the previous month.



Labour  
Relations Board

# Decisions June 77

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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1977] OLRB REP.**

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.



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**2081-76-U, 0041-77-U, 0048-77-U** The Ottawa Newspaper Guild, Local 205, The Ottawa Typographical Union, Local 102, The Ottawa W.E.B. Newspaper Press Men's Union #62, The Ottawa Stereotypers and Electrotypers Union #50, and The Ottawa Mailers' Union #60, (Complainants), v. **The Journal Publishing Company of Ottawa Limited** and L.A. Lalonde, (Respondents).

- and -

**The Journal Publishing Company of Ottawa Limited**, (Complainant), v. The Ottawa Newspaper Guild, Local 205, The Ottawa Typographical Union, Local 102, The Ottawa W.E.B. Newspaper Press Men's Union #62, The Ottawa Stereotypers and Electrotypers Union #50, and The Ottawa Mailers' Union #60, (Respondents).

**Duty to Bargain in Good Faith – Lockout – Whether refusal to bargain with union bargaining team because of objection to its composition constitutes bad faith – Whether a party may insist on discussing its choice of issues to the exclusion of all others – Whether damages, imposition of a collective agreement or interest arbitration appropriate remedy.**

**BEFORE:** Donald D. Carter, Chairman, and Board Members M.J. Fenwick and J.E.C. Robinson, Q.C.

**APPEARANCES:** *J. Sack and M. Mitchell for the Ottawa Council of Newspaper Unions; Colin Morley and H.A. Beresford for The Journal Publishing Company of Ottawa and L.A. LaLonde; Dennis Lane, Q.C. for F.P. Publications and witness D. Perks; A.G. Lennon for witness Suave; J. Ronald Scott for group of employees.*

**DECISION OF THE BOARD:** June 20, 1977.

1. This matter concerns three complaints brought under Section 79 of the *Labour Relations Act* relating to the labour dispute between five unions (The Ottawa Newspaper Guild, Local 205, The Ottawa Typographical Union, Local 102, The Ottawa W.E.B. Newspaper Press Men's Union, The Ottawa Stereotypers and Electrotypers Union #50, and The Ottawa Mailers' Union #60) and The Journal Publishing Company of Ottawa Limited (The Journal). The five unions have filed two of these complaints in which they allege that The Journal has violated section 14 of the Act by failing to bargain in good faith and to make every reasonable effort to make a collective agreement. The third complaint was filed by The Journal, and it alleges that the unions have violated section 14 during the course of negotiations between the two parties. These three complaints were consolidated by order of the Board.

2. There is also pending in this matter an application brought by the unions under section 90 of the Act seeking consent to prosecute The Journal for its alleged failure to bargain in good faith. The Board, having considered the representations of the parties, refused to consolidate this application along with the three section 79 complaints. The Board's refusal was grounded upon its characterization of the matter, at this stage, as being essentially civil in nature, amounting to a collective bargaining dispute that the parties had not been able to resolve. Any relief initially granted by this Board, therefore, should be of a civil na-

ture, directed at improving the bargaining relationship between the parties rather than at the imposition of sanctions that may only further exacerbate relations between the parties. Only after such civil relief proves to be ineffective does it become appropriate for the Board to consider the advisability of allowing recourse to criminal sanctions.

3. The first complaint filed by the unions named both The Journal and its publisher, L.A. LaLonde, as respondents. Objection to the form of this complaint was taken by counsel for LaLonde, raising the issue of whether LaLonde, as merely an agent of an employer, could be treated as a respondent. The Board considers that the obligation imposed by section 14 of the Act, requiring bargaining in good faith, is one directed towards the parties to collective bargaining – the employer and the union. An agent of an employer, such as LaLonde, does not have any interest in the matter separate and distinct from that of the employer. Where the obligation to bargain has not been fulfilled by an employer, the Board's remedial order is directed at the employer and not at its particular agents. We do not see this approach as giving rise to problems in the enforcement of the Board's bargaining orders, as argued by counsel for the unions, since any contravention of such orders would amount to an offence under section 85 of the Act. At that point, section 87 would come into operation, attaching criminal responsibility to any agent of the employer who has assented to the commission of such offence. The Board, therefore, ruled that L.A. LaLonde should be deleted as a respondent to the complaint.

4. At the very outset of these proceedings, a preliminary objection going to the matter of adequate notice was raised by counsel for The Journal. The unions' initial complaint, dated March 14, 1977, and received by The Journal on March 16th, contained only a loose outline of the nature of the offence, but indicated that further particulars would follow. Extensive particulars were delivered to the law firm of The Journal's counsel on the late afternoon of March 24th. These particulars, among other things, dealt with the role played by The Journal's counsel during the negotiations that were the subject matter of the complaint. At the commencement of the hearing on March 29th, counsel for The Journal requested a two-week adjournment for two reasons – 1) inadequate notice of the particulars; 2) the necessity for him to withdraw from the case and instruct other counsel. In response to this request, the Board ruled, having regard to the urgency of the matter, that The Journal had been given adequate notice, being given four full days to prepare to meet the particulars. The second ground for the request caused the Board greater concern since, in the circumstances, it considered that it should be open for counsel to withdraw from the case. The Board noted, however, that counsel could have withdrawn from the case as soon as the particulars were received, and he knew that he had been named in the particulars. Taking this factor into account, and also the urgency of the matter, a majority of the Board ruled that the adjournment should not exceed one day.

5. On the following day, The Journal sought judicial review of this ruling before Mr. Justice Keith of the High Court. The application for judicial review was dismissed that morning, and The Journal then sought leave to appeal from the Court of Appeal. A hearing before the Court of Appeal was held on March 31, 1977, and the application for leave to appeal was not granted. The Board's hearings resumed on the afternoon of March 31st, once the Court of Appeal had dismissed the application. On the next day, however, the parties jointly requested an adjournment for the purpose of allowing them to resume negotiations. These efforts proved to be unsuccessful, and the Board's hearings resumed again on April 13th. More will be said about this interlude when we set out the course of negotiations.



6. The evidence that came out in the many days of hearings that followed reveals a protracted and bitter labour dispute. It is a dispute where both the unions and the employer regard themselves as fighting for their very survival. The unions see the spectre of a radical technological change that would not only weaken their collective bargaining strength, but would also threaten the jobs of individual members and the very existence of the unions. The employer, fighting to redress an unfavourable competitive position in the Ottawa newspaper market, perceives restrictive union work practices as an evil that must be eliminated, and the immediate implementation of new processes as its only salvation. Ingredients such as we have in this case do not make for easy bargaining, as the facts that follow will indicate.

## I THE INITIAL BARGAINING FORMAT

7. Bargaining between The Journal and the five unions initially took place within a type of bilateral joint structure. The five unions had arranged to bargain within an umbrella organization, the Ottawa Council of Newspaper Unions (the Council), a procedure that had been followed during the previous round of negotiations. On the employer side, there existed an agreement between The Journal and The Citizen, the other English-language daily in Ottawa, to take a joint approach toward the unions in bargaining. Five contracts were up for negotiations: one between The Journal and The Ottawa Newspaper Guild; one between The Journal and The Ottawa Typographical Union; one between The Citizen and The Ottawa Newspaper Guild; one between The Citizen and The Ottawa Typographical Union; and a joint agreement between the "joint council" (comprised of the Ottawa W.E.B. Newspaper Press Men's Union #62, The Ottawa Stereotypers and Electrotypers Union #50, and The Ottawa Mailers' Union #60) on the one hand and The Journal and The Citizen on the other hand. Under the format established for bargaining, it was understood that there would be renegotiation of each of these five agreements, rather than the negotiation of just one agreement common to all. The renegotiation of the separate agreements, however, would take place within a format that would allow for joint participation on both the union and the employer side when each agreement was renegotiated.

## II THE EARLY STAGES OF NEGOTIATIONS

8. Notice to bargain was given to both The Journal and The Citizen by the Council in a letter dated May 14, 1976. This notice referred to the joint contracts between The Citizen and the Journal and the joint council, and the individual contracts between The Journal and The Ottawa Newspaper Guild, and The Citizen and The Newspaper Guild. Subsequently, on May 25th, the Council sent out an amended notice that included the two contracts between The Ottawa Typographical Union and The Journal and The Citizen, respectively. In addition, in June, The Ottawa Typographical gave separate notices to bargain to both The Journal and The Citizen. In his reply to this notice, L.A. Lalonde, The Journal's president and publisher, wrote on June 2nd: "We are agreeable to joint negotiations by both The Journal and The Citizen with the Ottawa Council of Newspaper Unions representing Local 102 of the Ottawa Typographical Union, Locals 50 and 62 of the International Printing Graphics and Communication Union, Local 60 of the International Mailers Union and the Newspaper Guild."

9. The parties then met on June 15th to discuss the form that the bargaining meeting should assume. The Council indicated that it preferred all-day meetings with three meetings

a week to discuss the details of individual contracts, and then a discussion of common proposals. The newspapers proposed a series of six meetings, commencing on July 8th. The five contracts would be discussed separately, one at each of the meetings, and then the sixth meeting would be used to discuss issues in common. No agreement was reached on the format of the meetings, but the parties did agree to exchange proposals in the near future.

10. The Council delivered a complete package of proposals to the newspapers on June 23rd. The newspapers responded by The Citizen delivering all its proposals to the Council, and The Journal delivering proposals respecting the contract with The Ottawa Typographical Union directly to that union. It is this proposal that later became the focal point of the unions' concern, and the stumbling block in the negotiations. What The Journal proposed was a contract similar to the one then in existence between The Citizen and The Ottawa Typographical Union. The effect of this proposal, however, would be to eliminate a substantial part, roughly 75 per cent, of The Ottawa Typographical Union's work jurisdiction. There is no doubt that the proposal was motivated by The Journal's desire to take advantage of the new technology that had drastically altered the manner in which newspapers are produced. The new process, "cold print", involving the use of Video Display Terminals (VDT), a computer, and plastic press plates, eliminated many of the tasks that were traditionally performed by employees in the composing room. The proposal, moreover, reflected The Journal's desire to remain competitive with The Citizen, which enjoyed a much more favourable arrangement with The Ottawa Typographical Union. The unions regarded this proposal in a much different light, viewing it as an attempt to wrest away work rights that had been solidly vested during the ninety-year relationship between The Journal and The Ottawa Typographical Union, and as a threat to the existence of a union presence at The Journal which, unlike The Citizen, did not have its newsroom organized.

11. The first negotiation meeting took place on July 8th to discuss The Citizen-Guild contract. On the union side were two representatives from the Council (one being its chairman, Jim McCarthy), the full Guild bargaining committee, and representatives from the other unions. On the employer side, were representatives of both The Journal and The Citizen. The meeting consisted of a detailed, word-by-word review of the Guild's proposal to The Citizen, an exercise considered by the unions as lacking much substance. The review was not completed during that bargaining session, and it was agreed that it should continue on July 12th.

12. The July 12th meeting took a much different turn. At the outset of that meeting, Syd Roberts of The Citizen issued a formal statement to the effect that the newspapers were breaking off discussions because the pressmen at The Citizen were not complying with their current contract, and that they would not meet on a joint council basis until they could determine what influence the joint council had over its constituent members. The Journal representative at this meeting, John Hamilton, indicated that he concurred in this position. Following this session of negotiations, the union responded by applying immediately for conciliation, individual applications being made in respect of each contract.

### III THE IMPASSE OVER JURISDICTION

13. The meeting with the conciliation officer took place on August 30th. By that time the unions had decided that the matter of The Ottawa Typographical Union's jurisdiction at



The Journal was to be the priority issue in any further negotiations. This position was made clear at the conciliation meeting and the issue of jurisdiction was discussed between the parties, but with no success. Although the unions indicated a willingness to give up some of the work jurisdiction, The Journal took a firm position that it wanted The Citizen contract language. The conciliation meeting ended with the parties still well apart over the question of jurisdiction.

14. The next meeting occurred on September 7th, and the jurisdiction issue was once again the sole issue discussed. The discussions followed the same course as those on September 30th, as The Journal firmly resisted any union overtures to change its position on the jurisdiction issue. At that meeting, the unions indicated their unwillingness to discuss the other contracts until the jurisdiction issue had been settled.

15. On September 15th, the unions submitted a proposal that would concede some jurisdiction by allowing direct reporter input into the VDTs in return for incentives for early separation. The parties met again on September 20th and this proposal was discussed, but The Journal continued to insist on The Citizen jurisdiction language. At the time, however, The Journal proposed three different early retirement incentives, and an extension of the job guarantee to cover all persons employed on or before June 1, 1974. It was apparent that the two sides were adopting quite different approaches in dealing with the impact of technological change on existing jobs. The union approach was one of a gradual relinquishment of the work jurisdiction, while the employer approach was one of offering financial incentives in order to reduce the work force as quickly as possible. The unions did not regard the employer's approach as being an acceptable compromise, and took the position that they would not meet to discuss the joint council's contract on the next day because of the lack of satisfactory progress on the jurisdiction issue.

16. The parties did meet, however, on September 27th, 29th, 30th to discuss the Guild-Citizen contract. Apparently, there was a return to the detailed review of the proposals that occurred during the meeting on July 8th, giving rise to dissatisfaction on the part of the unions. After these meetings, the Council decided to resume its position of not bargaining other issues until the jurisdiction issue between The Journal and the Ottawa Typographical Union had been resolved.

#### IV THE SLOWDOWNS

17. A "no-board" report was issued by the Minister of Labour on September 16th, putting the parties in a position to strike or lock-out on October 3rd. The unions, because of their dissatisfaction over the progress of negotiations, authorized a series of slowdowns at The Journal. There is no doubt that this form of strike action, legal at this time, had an extremely disruptive effect on The Journal, especially in respect to the distribution of its newspaper. As a result of these slowdowns, The Journal decided to cancel publication of the October 15th edition of the newspaper, at a cost to it of somewhere between \$40,000 and \$50,000. At the same time, The Citizen, pursuant to the understanding between the two newspapers concerning the conduct of joint negotiations, also cancelled publication for the 15th.

18. The next negotiation meeting took place on the day following the cancellation of the two newspapers. At the October 16th meeting, the parties met again to discuss the issue



of the Ottawa Typographical Union jurisdiction at The Journal. The discussions followed the same course as the earlier discussions, The Journal proposing job guarantees and the unions still insisting on the retention of the Ottawa Typographical Union's work jurisdiction. Following that meeting on the 16th, the two newspapers met to discuss the negotiations. These discussions indicated that a schism was beginning to develop between them, as The Citizen began to press The Journal to settle for less than the arrangement that it enjoyed with the Ottawa Typographical Union.

19. The parties met again briefly on October 19th, at which time The Journal indicated that a new offer wouldn't be available until Friday of that week. Both newspapers expressed concern about the slowdowns, and indicated that they would meet with the unions provided that the newspapers were published on time. On the 19th, both newspapers were cancelled in response to the slowdowns that were occurring at The Journal.

20. The parties met again on Thursday, October 21st, at which time a statement was made by Lalonde of The Journal to the unions. The statement expressed the desire of The Journal to resolve "the roadblock issues", and offered further job guarantees to the Ottawa Typographical Union, estimated by The Journal to cost \$500,000 for the next two years. The unions, however, did not regard this proposal as being a complete answer, since it did nothing to meet its concern over the elimination of work. The impasse over jurisdiction remained, and the threat of slowdowns continued.

21. The alliance between the Journal and The Citizen, already showing cracks, broke under the strains created by this situation. The Citizen, on October 22nd, informed The Journal that the alliance had ended, and issued a public statement to the same effect. The statement made it clear that The Citizen would no longer delay publication or cancel publication where The Journal was either published late or was cancelled entirely. The Citizen statement also contained a request to the Council that it now be allowed to negotiate with its own unions.

22. The Council and The Journal met on October 22nd, shortly after The Journal had been notified of the end of the alliance. The Journal raised the issue of how The Citizen's withdrawal would affect the bargaining format, and suggested the possibility of a plot by the unions and The Citizen against the Journal. The issue of jurisdiction was discussed once again, but no agreement was reached. The impasse remained. Following the meeting, Jim McCarthy (Council chairman and Citizen reporter) suggested that there did not appear to be any alternative to the slowdowns, a remark that was reported in the October 23rd edition of The Citizen. Reacting to this remark, The Journal publisher, Lalonde, was quoted in the October 25th Journal as suggesting a "co-ordinated plan to destroy The Journal economically".

## V THE LOCK-OUT

23. The Journal, on the evening October 25th, took action to lock-out its unionized employees. Unionized employees reporting to work that evening were barred from entering The Journal's premises, as were the unionized employees reporting to work on the following morning. A statement appearing in the October 26th Journal characterized the action as being a "total strike" by the Ottawa Typographical Union.

24. The lock-out signalled the beginning of an ever more bitter stage in this labour dispute. The Journal, by using its non-union staff and employees of other newspapers controlled by its parent company, F.P. Publications Ltd., continued to publish. The unions established a 24-hour picket line outside The Journal premises. The Journal gave its own labour dispute extensive coverage. Journal publisher Lalonde was quoted extensively in these articles, and there is no doubt that his remarks were intended to put the Journal's position in the most favourable light and the unions' position in the most unfavourable light. Lalonde repeated his charge of a plot to destroy The Journal, specifically naming McCarthy and the international representative of the International Typographical Union as conspirators. During this stage of the dispute, moreover, there were incidents of damage to The Journal's property, and the property of those who were assisting it in carrying out its operation. There was no evidence, however, that the acts that led to this damage were in any way authorized by union officials. In early November, the unions began to organize a circulation boycott of The Journal. Meanwhile, Lalonde, on November 11th, wrote to the Ottawa Newspaper Guild, the Ottawa Typographical Union, and the Joint Council, indicating that, because of The Citizen's withdrawal from joint negotiations, as well as the unions' agreement to separate negotiations, it intended to bargain with its own employees separately through each of their unions.

## VI THE POST LOCK-OUT NEGOTIATIONS – STAGE I

25. Through the efforts of Victor Scott, Director of the Ministry of Labour's Conciliation and Mediation Services, arrangements were made for a series of meetings between The Journal and the unions, to be held on November 22nd, 24th, 26th, 27th, 30th, December 7th and 10th. The first three meetings were to deal with the Joint Council contract, the fourth meeting was to deal with the Guild contract, the fifth meeting was to deal with the Joint Council contract again, the sixth meeting was to deal with the Guild contract again, and the final meeting was to deal with The Ottawa Typographical Union contract. It is clear that, prior to these meetings, the unions were aware of The Journal's concerns about meeting with McCarthy and the Council.

26. Present at the meeting of November 22nd were representatives of the Joint Council, including Burke McNulty (a Citizen employee), and representatives from the two other unions, Bob Earles, the International Typographical Union international representative, and Bill McLeman, Canadian director of the Newspaper Guild. On the employer side were Lalonde, Colin Morley (counsel for The Journal), and Edgar Lee (a labour relations advisor). The Journal submitted a contract proposal that substantially altered the jurisdiction and manning rights of the three unions. The unions agreed to study the proposal, and then respond. The meeting scheduled for the next day was cancelled in order to allow time for the unions to study the proposals.

27. The unions responded by sending to The Journal, under the letterhead of the Council, a package of proposals for all the contracts in dispute. The letter stated the willingness of the Council to negotiate on the proposals, and indicated a committee from the five unions of the Council would meet with The Journal on November 26th. Lalonde of The Journal replied on November 25th, stating its position that it intended to negotiate separately with the unions and, since it had made arrangement to meet with only the Joint Council, it would meet only under those conditions. When the unions arrived at the Chateau Laurier Hotel for the November 26th meeting, they were advised that the meeting



room had been cancelled. A representative of the unions then phoned Lalonde, who expressed surprise at this turn of events, and indicated unwillingness to meet, but only if the full Council was not present. The meeting did not take place.

28. Both parties showed up for the meeting of November 29th, that had been arranged for the discussion of the Guild contract. Present at this meeting for the union were Charles Higgins (an employee of The Journal and chairman of The Journal Guild Unit), Jim McCarthy (who had resigned as chairman of the Council but was still president of the Ottawa Newspaper Guild), Bill McLeman (international representative of the Guild), and Dan Gilligan (international representative of the Press Men's Union). Representatives of the other unions, as well as members of The Journal Guild Unit, attended as observers. At the commencement of the meeting, Lalonde of The Journal took exception to the composition of the union bargaining team, indicating that he would not meet as long as McCarthy, a Citizen employee, was present, and as long as the full council was there. The meeting was aborted, as the unions refused to comply with these conditions.

29. The meeting scheduled for November 30th was even less successful at getting off the ground. On the morning of that day, Gilligan of the Pressmen's Union phoned Lalonde to determine his intentions. Lalonde affirmed that he would meet only with Journal employees, and with one representative of each of the unions. Gilligan, on the other hand, made it clear that the unions would only meet as they had on the previous day. The impasse was not resolved, and no meeting occurred.

30. The December 7th meeting scheduled to discuss the Guild contract was no more successful than the November 22nd meeting, following a parallel course. The unions again appeared with a full complement of representatives, including McCarthy, to discuss the Guild contract. Lalonde reiterated that he was only prepared to meet with The Journal unit of the Guild, that Citizen employees must not be present, and that he would not meet with the Council. The union representatives retired from the meeting room, and did not return when the employer subsequently indicated that it would not relent. The same pattern of conduct continued. Prior to the December 10th meeting the employer indicated an unwillingness to relent, and the unions failed to appear at the meeting scheduled to discuss The Ottawa Typographical Union contract.

## VII THE AFTERMATH

31. The five unions, after the breakdown of the series of meetings held in November and December, then applied to the Ministry of Labour for formal mediation in a letter, dated December 17, 1976. At the same time, the union sent a letter to Lalonde, inviting The Journal to join in the official request. Lalonde replied, in a letter, dated December 20th, accusing the union of sabotaging the last series of meetings, and indicating that mediation was no substitute for direct negotiation. The letter went on to raise the issue of "pressure and violence" directed against The Journal and its effect on the bargaining relationship. The letter concluded by indicating that it was incumbent on the various unions to demonstrate "honest intent", but that The Journal was prepared to meet under normal bargaining arrangements. The text of this letter was set out in a publisher's statement appearing in the December 20th edition of The Journal. The statement then continued, quoting Lalonde as setting down the following conditions characterized in the statement as "pre-requisites to bargaining":



“There must be meetings between The Journal and its own employees. The Journal cannot be expected to meet with representatives of another paper when they have openly said they will damage The Journal.

The violence and intimidation must stop. We will not meet with gangsters.

The attacks our on business must stop. Nobody can claim to be interested in The Journal when he damages it. We will not employ people who are anti-Journal. For years, we have suffered from this kind of thing.”

The unions, meanwhile, because of their frustration over the process of negotiations, began to step up the boycott campaign, appealing to both subscribers and advertisers to boycott The Journal until the dispute was resolved.

## VIII THE POST LOCK-OUT NEGOTIATIONS – STAGE II

32. A second series of meetings, to be held in January, was arranged, once again through the offices of Victor Scott, on the understanding that the unions would meet with The Journal separately and that no Citizen employees would be at the bargaining table. The first meeting was held on January 5th to discuss the Guild contract. McLeman, Guild international representative, acted as spokesman for the Guild, and Lalonde continued to act as The Journal’s spokesman. Lalonde immediately raised the issue of damage to The Journal resulting from the boycott campaign, taking the position that other matters would not be discussed until the union provided assurances that the damage would stop. Negotiations broke off on that note, and later that day the parties agreed to resume their discussions on January 20th.

33. The next meeting, on January 10th, with The Ottawa Typographical Union, was no more successful. The spokesmen at this meeting were Earles (the union’s representative) and Lalonde. At the outset, Lalonde objected to the presence at the meeting of Gerry Rondeau, a member of the union’s bargaining committee, against whom criminal charges had been laid in respect of a picket line incident. After extensive discussion of the meeting, Rondeau withdrew in order that the negotiations could continue. The Journal then took the position that it had taken with the Guild – that the damage to The Journal must stop before other matters could be discussed. Again, an impasse resulted.

34. The next meeting was on January 10th between The Journal and The Joint Council (pressmen, stereotypers, and mailers). Again, The Journal reiterated its position that the boycott campaign must stop before other issues would be discussed. The second meeting with the Guild, on January 20th, followed the same course. The stalemate remained unresolved.

## IX THE JOHNSTON INQUIRY

35. On January 24, 1977, David Johnston, Dean of Law at the University of Western Ontario, was appointed by the Minister of Labour as an industrial inquiry commissioner to inquire and report on the still unresolved dispute. Dean Johnston first met with the parties

together on February 3rd. Later that day, he met separately with The Journal and then, on the next day, he met separately with The Journal and then, on the next day, he met with the unions alone. Meanwhile, on February 7th, the parties attempted to bargain once more – this time The Journal and the Joint Council. Again, however, The Journal took the position that the advertising and circulation boycott must cease before other matters would be discussed. The impasse remained. Commissioner Johnston met with the parties, both jointly and separately, on February 18th. The meetings were considered to be inquiry meetings rather than bargaining sessions.

36. The Commissioner's report, issued on February 24, 1977, recommended, among other things, that the parties resume direct bargaining immediately, that the unions stop the advertising and circulation boycott on the resumption of bargaining, that the unions assist The Journal in regaining its circulation and advertising once an agreement is executed, that the unions concede on the jurisdiction issue in return for job guarantees. The recommendations were accepted by the unions, but turned down by The Journal. The Journal indicated that three conditions had to be satisfied before it accepted the recommendations – 1) the boycott campaigns must be ended; 2) the unions must suggest ways of compensating The Journal for its losses; and 3) the unions must prove that they would not destroy the newspaper when they got their jobs back.

#### X NEGOTIATIONS DURING THE BOARD'S ADJOURNMENT

37. Following the rejection of the Johnston recommendations by The Journal, the unions filed a complaint with this Board on March 14, 1977. A hearing into this complaint convened on March 29th, but was adjourned until April 4th, on the joint request of the parties, who had indicated a desire to resume negotiations. On April 4th, the Board extended the adjournment on the understanding that the matter could be brought back on for a hearing by either side on the giving of twenty-four hours' notice. These adjournments were based upon an agreement between the two parties, providing that the negotiations would not prejudice the rights of either party in respect to the complaint before the Board, that the parties would invoke the assistance of a mediator, that there would be no pre-condition to the meetings, and that the time period set out in section 64 of the Act would not be considered to expire until the fifth day following the final disposition of the complaint before the Board.

38. The parties then met with Ray Illing, a Ministry of Labour mediator. The meetings commenced on April 1st, and continued through the weekend. On Saturday, The Journal, through the mediator, presented a proposal in respect of the Joint Council. The proposal dealt with a number of proposals relating to the terms and conditions of employment of the pressmen, stereotypers, and mailers, and also a proposal referring to a "damage and good conduct clause and orderly return to work clause". At the mediator's request, The Journal provided a clarification of this latter matter on the next day. This clarification referred to specified damage to vehicles, property, and newspapers, and the reservation of the right to claim damages resulting from the union boycotts. On that same day, The Journal presented, through the mediator, its proposal for the Guild contract. Then, on Tuesday, April 5th, The Journal presented its proposal for the Ottawa Typographical Union contract. These two proposals also contained a proposal concerning damage, good conduct, and orderly return to work. The Unions apparently regarded the first two proposals as being bargainable, but regarded the proposal for the Ottawa Typographical Union as being com-

pletely unacceptable, primarily because, in addition to not-giving any concession on jurisdiction, it provided no job guarantees at all.

39. The union response was to advise the mediator that they were returning to the Board. When advised by the Board that the hearing could not reconvene until April 13th, the unions then sought further negotiations with The Journal. The Journal indicated that it would only continue the negotiations if the unions withdrew the notice to return to the Board, if the notice period was extended to seventy-two hours, and if the "no prejudice" conditions were removed. These terms were regarded by the unions as unacceptable and, once again, negotiations came to a halt.

## XI HAS THERE BEEN BAD FAITH BARGAINING?

40. The bargaining between The Journal and its five unions represents a classic case of failed negotiations. Both sides appeared to regard the negotiations as a matter of survival, and justified their actions on this ground. The unions saw the jobs of their members, and their own existence, threatened by the impending introduction of new work processes. To the employer, however, the new work processes were its salvations, and the union's resistance to them came to be regarded as a plot to destroy its viability as a business enterprise, and a threat to its power to manage the business. Rather than forcing the parties to compose their differences, economic sanctions applied by both sides instead acted to reinforce the mutual mistrust that existed in this dispute.

41. The failure of negotiations, although not necessarily indicating the presence of bad faith bargaining by either, or both, of the parties, is often an indicator that the parties have not met the obligation to "bargain in good faith and make every reasonable effort to make a collective agreement". This duty, set out in section 14 of the *Labour Relations Act*, is one that is designed to improve the quality of collective bargaining negotiations by regulating the manner in which negotiations are conducted. At the very minimum, the obligation requires that the parties recognize each other for the purpose of collective negotiations, and that the parties then meet and engage in full discussion of the issues in dispute. The requirement of mutual communication is at the core of the obligation. Any breakdown of communication, because of an unwillingness of either or both of the parties to discuss their differences fully, breaches that obligation, allowing recourse to the remedial power of the Board. It should not be surprising, therefore, that failed negotiations often contain certain elements of bad faith bargaining.

42. This case is not an exception to this general observation. Here, both parties, during the course of negotiations, have failed to meet the standard imposed by section 14. Neither party had a monopoly on virtue in this matter. Each of these breaches has had the effect of further worsening an already difficult set of negotiations, and has contributed to the stalemate that remains today.

43. The first failure to bargain in good faith occurred in the early stages of negotiations, at the July 12th meeting, where the two newspapers unilaterally broke off negotiations pending the resolution of the dispute between The Citizen and the pressmen. This dispute related to a practice that had taken place during the existing collective agreement, and was one that could be resolved by recourse to the Board (as occurred) or to arbitration. We do not consider that the existence of this dispute justified a refusal on the part of the two em-



ployers to continue discussions until the matter was resolved. The break-off of negotiations at this point, moreover, simply served to reinforce the unions' mistrust of the employers' motives.

44. The next failure to discuss fully the issues in dispute occurred when the impasse over jurisdiction was reached in September. This time it was the unions, through their Council, that failed to discuss fully all matters in dispute, by refusing to discuss other contracts until the matter of the Ottawa Typographical Union's jurisdiction was resolved. The duty to discuss fully does not permit a party to discuss the issues of its choice to the exclusion of all others. To permit this kind of conduct would be to allow either party to confine the negotiations to the ground of its own choosing, an approach that the Board has already found to fall short of the obligation to discuss fully. See: *Canadian Industries Ltd.*, [1976] OLRB Rep. May 199. In this particular case, the Council's insistence on restricting the bargaining to jurisdiction created an impediment to the negotiations, an impediment that eventually led to the break-up of the joint negotiations.

45. The break-up of joint negotiations, in turn, contained certain elements that require close scrutiny. Following the withdrawal of The Citizen from the alliance, The Journal took the position that it would not bargain with the full Council, nor would it bargain with Citizen employees, and especially McCarthy. The Council, although it had no status as a bargaining agent, was an organization that had been freely selected by the bargaining agents as a vehicle for the conduct of their negotiations. Moreover, McCarthy, as chairman of the Council, had been acting as the principal spokesman for the individual bargaining agents. The Journal's refusal to bargain so long as the Council and McCarthy were present raises a serious question as to whether The Journal's position at this point in the negotiations amounted to a failure to bargain in good faith.

46. The question here is whether a union, as bargaining agent of the employees, is entitled to determine the manner in which it will conduct its part of the negotiations, and the persons who will act as spokesmen at these negotiations. We consider that such an entitlement does exist, and is qualified only by the obligation on that trade union to bargain in good faith and make every reasonable effort to reach a collective agreement. Section 56 of the Act provides:

56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

47. This section protects a union from employer interference with not only the formation, selection or administration of a trade union, but also the representation of employees by a trade union. The structure and composition of the union's bargaining team cannot be determined by the employer. A refusal by an employer to negotiate until the composition of the union's bargaining team is altered, therefore, amounts to a breach of the duty to bargain in good faith – the essence of the wrong being the failure to recognize the union, as represented by its properly constituted bargaining team.

48. The Journal's insistence on the exclusion of McCarthy from the negotiations clearly constituted an improper refusal to recognize the unions, amounting to a breach of section 14. The Journal's suspicions that McCarthy was intent on destroying The Journal do not provide a justification. The suspicions, although they may have been honestly held, were completely unfounded. It is clear that McCarthy, as principal spokesman, was merely attempting to bargain for the best deal possible, an approach that any other self-respecting union officer would take. There is not a single shred of evidence that McCarthy was in league with The Citizen to put The Journal out of business. Moreover, if McCarthy were sabotaging the negotiations for some improper motive, the proper approach for the employer to take would be a complaint alleging bad faith bargaining, rather than resorting to self-help which itself constituted a breach of the Act.

49. The legality of the refusal to meet the full Council is more problematic. It is clear that the Council had no status as a bargaining agent. The Council, therefore, was not entitled to usurp the bargaining rights of its constituent members and insist upon dealing with the individual contracts together. On the other hand, the constituent members are entitled to shape their own bargaining structure, and choose their own spokesmen when bargaining for their individual contracts. Was The Journal's refusal to meet with the Council merely a refusal to deal with the individual contracts as one package, or was it an attempt to determine the composition of the unions' bargaining team? On the evidence, we find that The Journal was not simply objecting to the discussion of the individual contracts as one package but was objecting to the bargaining structure itself. This objection, as well as the objection to McCarthy's presence at the bargaining table, constituted a failure to bargain in good faith.

50. The second stage of the post lock-out negotiations also contained certain elements of bad faith bargaining. The Journal's insistence upon discussing only the issue of damage to the exclusion of all others constituted the same kind of bad faith bargaining that it had experienced at the hands of the unions in September. The failure to bargain with Rondeau present, moreover, amounted to an improper failure to recognize a properly constituted bargaining team. The Ottawa Typographical Union, although it may have been unwise in doing so, was entitled to include Rondeau as a member of its bargaining team.

51. The incidents set out above, in our opinion, constitute the occasions where there has been a failure to bargain in good faith. Some comment, however, should be made about other aspects of this dispute alleged to have constituted bad faith bargaining. The unions argued that The Journal's use of its newspaper to disparage the unions amounted to breach of section 14. We have already found that The Journal did use its own newspaper to put its own position in the most favourable light, and the union's position in the most unfavourable light. This kind of action, although it may give rise to the question of whether it constitutes responsible journalism, does not amount to a failure to bargain in good faith. Many labour disputes are characterized by appeals for public sympathy and support from both sides, and these appeals may often disparage the other party. In fact, in this dispute, it is quite clear that the unions, through the use of the picket line, and their appeals to advertisers, and subscribers, and the distribution of their own publication "The Lock-Out Journal" were resorting to the same kind of tactics as The Journal. This case is not analogous to *Southam Co. Ltd.* (1947), 47 C.L.L.C. ¶16,484. In that case, the respondent used its newspaper to launch an appeal to intimidate its employees and thereby persuade them to repudiate their trade union. The appeals by The Journal in this case were not directed at its employees, but



aimed at the general public. This latter kind of appeal, although it may do nothing to improve relations between the parties, does not constitute a failure to bargain in good faith.

52. Another aspect of the dispute that requires comment is the breakdown of negotiations during the Board's adjournment. In our view, for the first time since the lock-out, some progress was being made in the negotiations. The unions, however, because of their dissatisfaction with The Journal's proposal for the Ottawa Typographical Union contract, served notice of their intention to return to the Board. The employer, then, refused to continue negotiations unless a new basis for the adjournment was negotiated. Neither of the parties, in these circumstances, breached section 14 of the Act. The unions, although their action was hasty, were entitled to continue with the hearings. Once the notice was given, however, the employer was entitled to insist upon different ground rules for any continuation of the negotiations, since the basis for the earlier agreement had disappeared.

53. The most serious allegation made by the unions was that The Journal had undertaken a course of conduct that was designed to wipe them out. Even though we have found instances of bad faith bargaining on the part of the employer, we do not consider that the evidence demonstrates any general design to eliminate the unions. The problem in this case is that, almost from the outset, both parties have regarded their very survival to be at stake. Hard bargaining by the other side, therefore, is not perceived as what it is but rather as amounting to something far more sinister. We do not see here any employer plot to destroy the unions, nor do we see any union plot to destroy the employer. What we see is a bitter and protracted dispute that can only be resolved by sensible and realistic attitudes on both sides of the bargaining table.

## XII THE APPROPRIATE REMEDY

54. The relief requested by the unions was what they termed a "make-whole" order. The components of this relief, as argued by the unions, would be the imposition by the Board of the contractual terms that they would have been expected to reach had there been good faith bargaining, such terms to be retroactive to the expiry date of the paper's own contracts, damages to the employees for loss of wages and other employment benefits from the time of the lock-out, and damages to the union for its litigation and lock-out expenses. Put more bluntly, the unions were asking that the Board resolve this dispute by acting as an interest arbitrator, arguing that such a remedy was the only effective deterrent against failures to bargain in good faith.

55. This request for "make-whole" relief has serious implications for the collective bargaining process in this Province. This process, as it is defined in the *Labour Relations Act*, clearly provides that labour disputes are to be ultimately resolved by recourse to economic sanctions – The strike and the lock-out. Compulsory interest arbitration has never been an ingredient of this statutory scheme. Does the existence of bad faith bargaining allow the Board to deviate from the clear scheme of the Act when exercising its remedial authority? We think not.

56. The obligation contained in section 14 is an obligation to bargain. Parties to collective negotiations are required to bargain in good faith and to make every reasonable effort to make a collective agreement, but they are not required to reach a collective agreement. Good faith bargaining cannot be equated to the execution of a collective agreement



and, conversely, bad faith bargaining cannot be equated to a failure to reach agreement. In other words, it is possible for the parties to comply with the obligation set out in section 14, and still not reach agreement. Where the obligation is breached, therefore, it cannot be assumed that an agreement would have been reached but for the existence of bad faith bargaining. The imposition of a collective agreement, therefore, is not within the scope of the Board's remedial authority where it is attempting to redress a failure to bargain in good faith.

57. Not only would the imposition of an agreement be inconsistent with the scheme of the Act, but it would be a remedy that would be difficult for the Board to implement. What would be the terms of the collective agreement that the Board would impose? The unions argue that it would be the agreement that would have been reached if the failure to bargain had not occurred. It is possible, however, that, even if there was a breach of section 14, a collective agreement might not have resulted. And, even if we were to conclude that a collective agreement would have been reached, we might also conclude that the terms of that agreement would be most unfavourable to the unions. The problem with the remedy proposed by the unions is that it would require the Board to engage in an exercise of speculation. The Board would be venturing into the uncertain sea of interest arbitration without benefit of even such rudimentary navigational aids as the criteria that are found in those statutes that provide for interest arbitration.

58. The use of interest arbitration as a section 14 remedy would also pose dangers to the collective bargaining process itself. There would be a great temptation for parties to abandon the bargaining table for the Board where the bargaining process was not working in their favour. In other words, parties might well seek to gain concessions at the Board that they could not gain at the bargaining table. We do not consider that the Legislature ever intended to supplant the bargaining process by imposing a duty to bargain in good faith, and providing the Board with extensive remedial powers. This duty, and the Board's remedial powers, exist to complement the bargaining process, not to displace it.

59. Does the Board's refusal to impose a collective agreement mean that breaches of section 14 cannot be remedied effectively? The Board, although it cannot provide a final solution for hard bargaining disputes, can issue remedial orders directed at restoring the bargaining relationship, and improving the manner in which negotiations are conducted. The success of these orders, however, will depend very much upon the speed with which they are sought. A deteriorating bargaining relationship is much easier to restore at the time when cracks first begin to show, rather than when it has started to crumble. In this case, if either party had come to the Board for relief at an earlier stage, rather than resorting to self-help, it is likely that a Board direction would have been more efficacious. As it stands, the Board is faced with the extremely difficult task of attempting to restore a bargaining relationship that has deteriorated severely.

60. The ancillary request for damages also poses serious problems. The employer argued that the Board's general remedial power, found in section 79 of the Act, does not permit the awarding of damages, except in the limited circumstances where the Board is reinstating an employee under section 79(4)(c). The essence of the argument was that the power to award damages must be conferred upon the Board by a specific provision of the Act. We do not consider that the general remedial power is limited in such a way. The language of section 79 clearly provides the Board with the broadest power to provide relief where there

has been a breach of the Act. The language of section 79(4)(c) is intended to clear up any doubts about the Board's power to reinstate employees, a remedy not available at common law, and not to restrict the awarding of damages to this one situation. The power of an arbitrator to award damages in the absence of express statutory authority has had longstanding approval from the Supreme Court of Canada. See: *Polymer Corp.* (1962), 33 D.L.R. (2d) 124. It would be strange indeed if the Labour Board did not have at least equal remedial authority, where the language of the legislation so clearly provides for it.

61. The existence of the power to award damages does not necessarily mean that such relief is appropriate. Although we do not agree with the employer's argument that damages are never an appropriate method of remedying a failure to bargain in good faith, we recognize that this type of remedy must be imposed with care. There are two concerns of particular importance. First, the awarding of damages should not result in the indirect imposition of a collective agreement. In this case, therefore, it would be inappropriate to award damages for loss of wages suffered as the result of the lock-out, since this approach would require the Board to determine terms and conditions of employment for those employees during that period. Second, the Board should not compensate for damage that results from the use of legal economic sanctions. The problem, in this case, is that the lost wages and employment benefits flow from the lock-out – an action that was timely, and not prohibited by the *Labour Relations Act*. The mere existence of an element of bad faith bargaining cannot convert an otherwise legal strike or lock-out into an illegal act, that would give rise to extensive liability in damages. The wrong lies with the manner in which the negotiations are conducted, not with the use of the economic sanction. To hold otherwise would introduce into the strike and lock-out an element of uncertainty that would disrupt the process of labour relations as it now exists in Ontario. In this case, although it is clear that the lock-out was not connected initially with any failure to bargain in good faith on the part of the employer, it could be argued that the employer's later failures to bargain in good faith subsequently tainted the lock-out. We do not accept this argument. The lock-out continued to be legal and damages, if any, must relate to extra negotiating costs that might have been caused by the employer's conduct, and not to the economic losses resulting from the lock-out itself.

62. In the circumstances of this case, however, we do not consider it appropriate to award damages for the extra negotiating costs that might have been incurred by the unions. This is a case where neither side can be given a clean bill of health, both sides on different occasions having failed to meet the standard of good faith bargaining. The responsibility for the breakdown of negotiations must be borne by both sides. Moreover, if these complaints had been brought to the Board more quickly, it is quite possible that the situation would have been corrected, and the damage would have been minimal. In this case, therefore, the Board does not consider it appropriate to award damages.

63. The appropriate remedy, in the Board's view, is a bargaining order directed at both sides. Given the strained relationship between the parties, this bargaining order should be supplemented by a direction to the parties to make joint application for mediation services.

64. Accordingly, the Board directs The Journal Publishing Company of Ottawa Limited, The Ottawa Newspaper Guild, Local 205, The Ottawa Typographical Union, Local 102, The Ottawa W.E.B. Newspaper Press Men's Union #62, The Ottawa Stereotypers and



Electrotypers Union #50, and The Ottawa Mailers' Union #60 to make a joint request forthwith to the Director of Conciliation and Mediation Services for the appointment of a mediator, to meet with the mediator at his earliest convenience, and to bargain in good faith and make every reasonable effort to conclude a collective agreement.

**DECISION OF BOARD MEMBER J.E.C. ROBINSON, Q.C.:**

While I am not in agreement with some of the findings of fact and law made by the Chairman in his decision, nor with some of his obiter associated therewith, I am in agreement with the ultimate remedy and direction in such decision, and I would accordingly so find.

**CONCURRING OPINION OF BOARD MEMBER M.J. FENWICK:**

1. I concur in the decision directing that the parties resume contract bargaining with the assistance of an Ontario Labour Ministry mediator.

2. This case came before us as an alleged violation of the *Labour Relations Act*, but it is really about the economic benefits and human costs of technological change. The Journal is seeking to enhance its competitive position by the introduction of automated production techniques which would substantially alter the composition of its work force. Indeed, The Journal considers the introduction of such equipment essential to its economic survival.

3. The perspective of the employees is radically different. For them, automation means erosion of skills which took years to acquire, and on which their livelihood depends. Technological change raises the spectre of unemployment and hardship. For the employees, the long run benefits to what may well be their *former* employer are less important than their own real and immediate personal costs. These costs include not only such monetary ones as loss of income resulting from unemployment or a downgrading in occupation, but also the "psychic" discomforts in adjusting to a new occupation, new co-workers, a new employer and perhaps a new community. It is not surprising, therefore, that employees view automation with apprehension and suspicion; and may be hostile to apparently generous monetary proposals which merely accelerate their redundancy.

4. The employer regards automation as the source of economic benefit. The displaced employee regards it as the cause of severe economic and social dislocation.

5. Technological change would be a difficult problem in the best of industrial circumstances, but it is particularly provocative in the newspaper industry. In that industry market pressures have been intense, with the result that there is a great incentive to introduce cost saving innovations.

6. This has provoked bitter confrontations between employers and unions, and on occasion has resulted in the actual destruction of one or the other.

7. Employers regularly carry "strike insurance" and train their management so that they can fill in in case of a strike.



8. Unions have actively sought to protect the jobs of their members. As a result labour relations in the industry have been marred by a number of bitter and protracted disputes. This general atmosphere of conflict, and the fears of the parties themselves, have regularly influenced the course of bargaining and poisoned the parties' relationship.

9. The problem of automation has been studied and discussed for almost two decades. As long ago as 1963, the Hon. H.L. Rowntree, the [then] Minister of Labour, proposed a "foundation on automation" to seek solutions for the apparently inevitable conflict between the quest for efficiency and profit and the human costs which this may involve. No such program was forthcoming and the problem remains one which is left to collective bargaining.

10. Collective bargaining is necessarily an adversarial process where disputes are ultimately resolved by a resort to economic sanctions. The interests of the employer and his employees are not identical and compromise is achieved by threatening to raise the cost of further disagreement.

11. Seldom, however, is the very existence of the parties threatened. That is the fear in this case. It is a fear which is keenly felt by both sides, and is not entirely unreasonable given the consequences of automation, and the labour relations atmosphere in that industry. It may be that the employer will be successful in maintaining his lock-out and will ultimately eliminate both the opposition to automation and the union itself. On the other hand, the trade union may be successful in maintaining its boycott and reducing The Journal's circulation to a degree which will prompt advertisers to switch to The Journal's competitor (and one-time ally) the Ottawa Citizen.

12. It may be that both sides will measure the costs of this protracted conflict and will decide (what I firmly believe) that it is in their mutual interest to compromise. What is apparent, is that such compromise is impossible, when each believes that the other is seeking its destruction. We have found that this fear is unfounded, and that both sides at one point or another sought to compromise. We have found that there is no "co-ordinated plan to destroy the Journal" nor is there a conspiracy to destroy the union. Nevertheless, these *beliefs* inhibited both sides, and prevented the parties from conducting more productive negotiations. These fears could have been dispelled by mutual assurances, but in the atmosphere of mistrust which surrounded these negotiations, such assurances were either not given, or not believed.

13. Collective bargaining involves a communications process, but it would be wrong to believe that "better communications" will necessarily result in the successful resolution of collective bargaining disputes. Improved communications can make a material difference only where the parties have shared objectives unknown to themselves or are operating under misapprehensions which can be clarified by discussion. Where there is genuine disagreement, improved communications are unlikely to be of much help.

14. In this case, however, we have had ample evidence of fundamental misconceptions which each party had concerning the motives of the other. These were thoroughly aired in the hearings before us and hopefully have been dispelled by this process. Neither party was bent upon the destruction of the other. There are real and important disagreements between them, but both parties have allowed their fears to induce inflammatory con-

duct and emotional outbursts which are not conducive to a rational discussion or their problems. Such discussion is possible and desirable.

15. Hopefully, the Board's findings and its remedial order can provide the basis for a more accommodative bargaining relationship which is the essential prerequisite for a satisfactory resolution of their problems.

16. The road back to normal employer-union relations in The Journal is strewn with bitter memories of incidents arising out of the dispute. They will have to be discarded in the interest of both parties – the locked out employees who hope renewed bargainings will result in reinstatement in their jobs and The Journal which hopes to bolster its quest to make its paper a successful and competitive publishing enterprise.

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**0100-77-R** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant), v. **Canadian Bread Division of Corporate Foods Limited (Bartley Drive Plant)**, (Respondent), v. The Retail, Wholesale, Bakery and Confectionery Workers' Union, Local 461 of the Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Intervener).

**Certification – Membership Evidence – discussion of the proper form which membership evidence must take.**

**BEFORE:** D. H. Kates, Vice-Chairman and Board Members H.J.F. Ade and M. J. Fenwick.

**APPEARANCES:** *Harold F. Caley and Mel Stringer for the applicant; James G. Foy for the respondent; H. Buchanan and W. Haynes for the intervener.*

**DECISION OF THE BOARD:** June 7, 1977.

1. This is an application for certification requesting a pre-hearing representation vote.

2. The intervener has intervened in these proceedings and has alleged certain irregularities in the applicant's membership evidence filed in support of its claim for bargaining rights. At the hearing of this matter the Board corrected an impression left with the intervener with respect to the alleged irregularity. It was pointed out that the receipt portion stapled to the applications for membership documents indicated that the collector had signed the receipt and the applicant for membership had initialled the document indicating that he had paid the dollar initiation fee. This appeared to be the case on forty-nine (49) of the cards filed by the applicant. The intervener was under the impression that the receipts were not signed by the collector but were initialled. Be that as it may, the intervener submitted

that the cards were tainted, having regard to our practice with respect to the reception of membership evidence, and in absence of appropriate disclosure on *The Declaration Concerning Membership Documents* (Form 8), the Board ought to dismiss the application.

3. The Board notes that the nature of the irregularities alleged by the intervener with respect to the applicant's membership evidence would not in our view so confuse the Board so as to inhibit us from determining that the applicant for membership desired to join the applicant organization and paid a dollar in accordance with the Board's policy requirements. If anything, the failure of the applicant for membership to sign his name in full acknowledging that he had paid the dollar would induce the Board, at worst, to direct a representation vote in order to dispel any doubt that had been cast on the cards arising out of the shortcomings alleged. In this case, by the very nature of the proceedings, a pre-hearing representation vote has already been directed and held.

4. The intervener's representative requested that the Board clarify, for the benefit of the trade union community, the Board's standards with respect to our requirements for proper documentary evidence of membership. In this regard we refer to the *Frank Licari & Sons case*, [1967] OLRB Rep. 57 (April) at p. 59.

6. "On applications for certification, the evidence of membership filed in support of the application may take one or two forms, either of which meets the Board's requirements. The first consists of applications for membership in the applicant union together with proof that the applicant has paid at least one dollar to the union. The sad part of this case is that the applicant could easily have met this requirement if it had used different documents to support its position. However, even the one application and receipt filed by the applicant was misleading. One of the requirements of the Board is that the application card be signed and the money be paid within certain time limits in relation to the date of the application. It is therefore important that the date on the card and the receipt be accurate because this date is used by the Board in determining whether the requirements as to time have been met. The date on the card filed in this case was misleading because although it was the date the card was signed, it was not the date on which the money was paid. That had occurred some months previously."

7. "The second form of membership evidence consists of documentary evidence that the persons concerned are in fact members of the applicant union. This form usually consists of certificates of membership or dues books and is used where the employees in question are members and there is no need to sign them up again for purposes of the application. Dues books will accurately reflect the exact status of the member. Certificates of membership are intended to accomplish the same purpose and it is important that the statements contained therein be accurate in all respects. If they contain a statement that the person was initiated on a specific date, that person must have been in fact so initiated. If they certify that monthly dues have been paid, these dues must have in fact



been paid and not, as in this case, an initiation fee only and this some months prior to the month for which it is asserted that dues have been paid. As has been pointed out in many decisions, the Board is dependent to a large extent on the documentary evidence filed by the union because it would be an impossible task for it to verify the membership evidence for every individual by conducting a personal inquiry. It is incumbent, therefore, upon unions to be most circumspect with the documentary evidence they file and to make sure that it is accurate in all respects. In the case of the present applicant, it will now have to re-examine its use of certificates of membership in the light of the above considerations and its own practices and procedures.”

5. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

6. The Board further finds that all regular employees at 196 Bartley Drive Branch, Toronto, save and except driver salesmen, garage employees, office staff, foremen and foreladies, persons above the rank of foreman or forelady, and persons regularly employed for not more than twenty-four (24) hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

8. On the taking of the pre-hearing representation vote directed by the Board more than fifty per cent of the ballots cast were cast in favour of the applicant.

9. A certificate will issue to the applicant.

10. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

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**0842-76-R Canadian Union of Bank Employees, (Applicant), v. Canada Trustco Mortgage Company, (Respondent).**

**Certification – Bargaining Unit – Whether a single branch of a multi-branch financial institution is an appropriate bargaining unit.**

**BEFORE:** M. G. Picher, Vice-Chairman and Board Members H. J. F. Ade and D. B. Archer.

**APPEARANCES:** *Daniel Ublansky for the applicant; C. G. Riggs and J. T. Lindores for the respondent.*

**DECISION OF THE BOARD:** June 2, 1977.

1. This is a case of first impression insofar as it is the first time this Board has been requested to issue a certificate in respect of the "banking" employees of a trust company. The issue here is the appropriateness of the bargaining unit requested by the applicant union. It seeks a certificate as the exclusive bargaining agent of all employees of the respondent employed in its branch at Simcoe, except the assistant manager and persons above that rank.
2. The employer takes the position that the single branch is not an appropriate bargaining unit. It submits that an appropriate unit must also include the employees at its branch in the neighbouring Township of Delhi or, in the alternative, the employees in all of the branches in the employer's administrative division of south-western Ontario, including London, Windsor, Chatham, Sarnia, St. Thomas, Simcoe and Delhi.
3. In view of the nature of this case the Board is indebted to counsel for both parties for their able and thorough submissions.
4. The respondent is a trust company with branches across Canada. A good number of them are located in Ontario and are distributed within several administrative regions within the province. The regional office and branches of the respondent in south-western Ontario have some 300 employees. The branches provide the usual savings, loans, investment, estate, and other financial services normally associated with a trust company. Not all branches, however, offer the same range of services. There are four full service branches which are located in Windsor, Sarnia, Chatham and London. Each of the full service branches provides, in addition to savings and loan services, specialized services in mortgages, personal trusts, estate planning, and investment planning. There is a satellite branch associated with each full service branch and located within the same municipality. Finally there are thirteen savings branches which provide primarily a savings and loan service. The Simcoe branch is a savings branch and so is the branch at Delhi; the business of a customer dealing with them who requires services not available at a savings branch is referred either to a full service branch or to the regional head office for south-western Ontario, which is located in London.
5. The Simcoe branch has nine full-time employees. The Delhi branch has four. Other branches of the respondent in the south-western region vary widely in size: some six branches have four employees, five have between four and ten employees, five have between

ten and twenty employees, three have slightly over twenty employees and one branch, being the main branch in London, has seventy-nine employees. The Regional Office has sixteen full-time employees.

6. Section 6(1) of The Labour Relations Act describes the Board's duty in every application for certification.

6. (1) Subject to subsection 1a, upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

7. In any particular case, the determination of the unit of employees that is appropriate for collective bargaining must be grounded in the facts before the Board. The Act contemplates a process of unit determination that is not absolute and to a great extent the Board's determination must depend upon the competing alternatives presented by the parties. In the contemplation of the Act, therefore, the duty to determine the appropriate bargaining unit is a mandate to describe the unit in the light of the labour relations realities of the particular case.

8. Dealing with this case we consider firstly whether a grouping of the employees of the Simcoe and Delhi branches would be an appropriate bargaining unit. One question to be determined is whether there is a community of interest among the employees of both branches as regards their employment relations. The factors that the Board considers respecting that question are:

1. The nature of the work performed.
2. The conditions of employment.
3. The skills of employees.
4. Administration.
5. Geographic circumstances.
6. Functional coherence and interdependence.

(See *Usarco Ltd.*, [1976] OLRB Rep. Sept. 526).

9. Simcoe and Delhi are some 12 miles apart. The respondent's branches in both locations service customers drawn from the tobacco growing country which surrounds them.

10. There is no interchange of employees between the two branches at the bargaining unit level save that the loan officer at the Simcoe branch services the Delhi branch by going there once a week. For internal administrative purposes he maintains a single account in respect of loans from both branches.



11. Each branch has its own manager; their responsibilities are separate. If, however, the manager of one branch is absent due to illness, the other branch manager will cover for him. Otherwise the branches are essentially autonomous operations related by their ties to a common head office in London. With the exception of the loan officer there is, on a day to day basis, little if any, functional coherence or interdependence between the employees of the two branches.

12. While it is true that the nature of the work performed, conditions of employment and skills of employees are virtually the same, those factors bear considerably less weight when the activities of the two groups are carried on with little or no functional interdependence and at some distance. Any special relationship between these two branches is slim, being grounded in no more than the slight interchange of the loan officer, the fact that the managers occasionally fill in for each other in the event of illness, and the common location of the two branches in tobacco country. It appears to us that the coupling of these two branches for bargaining is an arbitrary delineation that is not based on labour relations considerations and therefore does not commend itself. If there is any community of interest between the employees of these two branches from a labour relations standpoint, it is the same community of interest that they would share with the employees of all branches in south-western Ontario. The issue therefore becomes whether the employees of the Simcoe branch or the employees of all branches in south-western Ontario constitute the appropriate bargaining unit.

13. We turn now to consider that question. The evidence establishes that all branches in the south-western region are subject to the administrative supervision of the regional head office in London. A regional newsletter is distributed to all branches from London and the regional Vice-President and Assistant Vice-President as well as resource staff from the head office make occasional visits to the branches.

14. Salary, benefits and working conditions are common throughout the region and the payroll is administered from a central computer in the regional head office.

15. Clerical staff are hired by the branch manager subject to the approval of the Regional Assistant Vice-President. Accountants and loan officers are hired on the joint decision of branch managers and the regional head office, with the latter having the last word in the event of any divergence of opinion.

16. Trainees for the position of loan officer and accountant are hired by the branch manager subject to the approval of the regional head office, and upon completion of their training they may be moved to another branch. Otherwise there is little or no transfer between branches upon promotion except among managers and established accountants, neither of which classifications is part of the proposed bargaining unit at Simcoe.

17. The company's policy respecting termination of employment is that at least two members of management must approve the firing of any employee and that head office approval is required in each case. This aspect of managerial decision-making, therefore, like hiring, formally involves both the branch manager and the regional head office.

18. These employment policies reflect the kind of standardization to be found in other centralized corporate enterprises that have been considered by this Board (see e.g.

*McDonald's Restaurants of Canada Limited* [1974] OLRB Rep. Oct. 755 (*supra*) and *Ponderosa Steak House (a Division of Foodex Systems Limited)* [1974] OLRB Rep. Nov. 7). The Board's decisions have proceeded on the general principle that while the employer's administrative structures are relevant in determining the bargaining unit they are not necessarily to be taken as the conclusive blueprint in deciding what is appropriate. The structures and policies that promote a maximization of the employer's business interests are not necessarily those that will describe a sound and viable bargaining unit within the contemplation of The Labour Relations Act.

19. In the instant case, the standardization impressed on all employment relations by the flow-charts and policies of the employer does give rise to a community of interest among all employees in the branches of the south-western Ontario region. But that does not of itself dispose of the question of what is the appropriate bargaining unit. As the Board said in *Ponderosa* (*supra* at 10):

It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest. Section 1(1)(b) of the Act states that: "‘bargaining unit’ means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them." This provision makes it quite clear that the determination of appropriateness does not always lead to the conclusion that the most comprehensive unit is also the most appropriate unit. Consideration of the wishes of employees and of industrial relations policy, may very well dictate that a smaller bargaining unit is the appropriate unit.

20. It is also possible, of course, that different communities of interest will exist at one and the same time among several different groupings of employees. Obviously certain common employment interests exist among all employees of the respondent in Canada; the portion of those employees who are within Ontario have a further common interest; and the group of employees working under the direction of the London regional office have employment interests in common that they do not share with their fellow employees elsewhere in Ontario or in Canada at large. The next question is whether a separate community of interest, based on day to day dealing with their vital job interests, is found among the employees of the branch at Simcoe.

21. We find that a separate community of interest among the employees at that organizational level is clearly made out. Although in theory the regional office oversees any major decisions in employment relations, the fact is that with some 300 employees spread over twenty autonomous branches the power of effective recommendation, if not the last word, in hiring, promotion, discipline and discharge rests largely with the local branch manager. In those matters the employees at Simcoe have a community of interest not shared with the respondent's employees elsewhere in south-western Ontario. Being subject to the employment policies of the regional head office, receiving a regional newsletter and being paid from a single computer in London produce a community of interest among employees region-wide that is, in our view, less compelling in determining the appropriate bargaining unit than the more immediate and vital employment concerns that give rise to the separate community of interest among the employees in the single branch at Simcoe.



22. But that is not the end of the matter. There is no presumption that the smallest unit in which a material community of interest can be found will be the appropriate bargaining unit. Along with the existence of a separate community of interest within the smaller unit, the Board must weigh the risk of fragmentation and the manageability of that unit or a pattern of units like it from the standpoint of both parties. Balancing all of these factors the Board must strive to define a rational delineation of employees that will be a viable entity for collective bargaining.

23. We turn, therefore, to consider the relative merits of the region-wide unit and the single branch unit from the standpoint of their manageability. That includes an assessment of their susceptibility to organization and administration for labour relations purposes and the related issue of any possible adverse effects that might flow from fragmentation of the employees.

24. Dealing with the last point first, we find that a ruling in favour of the single branch unit would not leave the parties open to the adverse effects of fragmentation. The Simcoe branch is a distinct employment entity not unlike a separate plant in the industrial sphere. All of the employees in that location could be included in a single unit so that the risks of patchwork bargaining by department would not be present. While that might be a material consideration in the case of a larger branch where a trade union sought to carve out a small group of employees within the branch for collective bargaining purposes, it is not a concern in this case.

25. With regards to the manageability of a single unit at Simcoe we are satisfied that inasmuch as there is little or no interchange of employees between branches, a pattern of single branch units similar to this one would not prejudice the employer in dealing with such matters as job posting, promotion and seniority.

26. Counsel for the respondent stressed the preferability of the unit encompassing all employees in south-western Ontario largely on the basis of the susceptibility of that unit to smoother administration from the viewpoint of the employer. He argues that if the applicant is to organize any of its employees in this region it must organize all of them. The applicant sees some doubtful generosity in this part of the employer's submission. The union points out that it would be virtually impossible to organize, all at one time, the disparate and widespread grouping of all of the respondent's 300 employees in its 20 branches across south-western Ontario. It submits that the Board may and should take that fact into account in its determination of the appropriate bargaining unit.

27. In determining the appropriate bargaining unit the Board cannot disregard the labour relations realities before it. When a group of employees signify that they wish to exercise their right to bargain collectively, and that grouping is seen by the Board as sufficiently conforming to the Board's criteria of appropriateness as a bargaining unit, this Board should not require bargaining in a more comprehensive unit if to do so would effectively impede the access of that group of employees to any collective bargaining at all. As was said by the British Columbia Labour Relations Board in *Woodward Stores Vancouver Limited*, [1975] 1 C.L.R.B.R. 114, quoting the earlier *Insurance Corporation of British Columbia*, (No. 2) decision of the same Board:



“However, clearly one can’t have collective bargaining at all unless there is a unit in which a majority of employees will select a trade union’s representative. There are certain types of employees who are traditionally difficult to organize and there are some employers who are willing to exploit that fact and stipulate opposition to a representation campaign. If notwithstanding these obstacles, a group of employees within a viable unit wishes to have a union represent them, the Board will exercise its discretion in order to get collective bargaining under way. In that kind of situation, it makes no sense to stick rigidly to a conception of the best bargaining unit in the long term, when the effect of that attitude is to abort the representation effort from the outset.”

(The same view is expressed by The Canada Labour Relations Board in *Canadian Pacific Limited, Vancouver, B.C.* (1965), 13 Di 13 at 31 and applied by the National Labour Relations Board in *Hawaii National Bank, Honolulu*, 212 N.L.R.B. No. 82 (1974) at 578). In assessing the viability of a unit of employees for collective bargaining, the Board cannot disregard the threshold question of that unit’s very ability to organize and exist. That realization is one of the considerations that underlie the Board’s policy generally to restrict the scope of a bargaining unit to the municipality in which that part of the employer’s operations are located.

28. That is not to say that there is a presumption that any grouping of employees that comes before the Board is the appropriate unit simply because that is their wish. As the Board said in *Ponderosa*, (*supra* at 10):

The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. — — — In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization.”

We agree with the argument of counsel for the respondent that our responsibility in this regard would not be discharged if we should automatically infer that the smallest unit of employees susceptible to successful organization must be the appropriate bargaining unit. The amenability of the employee grouping for purposes of organization is but one factor among many to be weighed by the Board in the overall determination of appropriateness. Other industrial relations considerations such as community of interest, fragmentation and ongoing administrative manageability may conflict and ultimately override. In this case we have weighed those considerations and we find that they do not override. We see nothing in the facts before us to suggest that a single branch unit or a pattern of such units where there is no functional integration among them would unduly fragment the employees for collective bargaining purposes or substantially impair the operations of the employer.

29. We therefore find, having regard to the separate community of interest of the respondent’s employees within the Simcoe branch, the low risk of harm as a result of fragmentation, and the overall manageability of that unit from the standpoint of both union and employer, including the amenability of the unit to organization for collective bargaining purposes, that the single branch unit requested by the union is preferable to the multi-

branch unit sought by the employer. While the facts and the application to them of conventional labour relations policy bear out this conclusion, our decision is reinforced by the broader experience of the National Labour Relations Board in cases respecting the determination of bargaining units among the employees of financial institutions. The practice of that Board reflects the view that in a financial institution, as in any employment context, where there is a minimal interchange of employees between branches and the effective day to day control of essential employment interests is within the autonomy of the single branch, the employees of the single branch will form an appropriate bargaining unit. (See e.g. *Bank of America National Trust and Savings Association* (1972), CCH N.L.R.B. 24128; *Wayne Oakland Bank V.N.L.R.B.*, 462 F 2d 666 (1972); *Hawaii National Bank, Honolulu* (supra).) In our view that approach is appropriate and applicable to the instant case.

30. The Board finds that all employees of the respondent at its branch in Simcoe, save and except the accountant, assistant manager, persons above the rank of accountant and assistant manager, persons employed in the real estate offices, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

31. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 17, 1976, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

32. A certificate will issue to the applicant.

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**1864-76-R** The Employees' Association of Canron Limited, (Applicant), v. **Canron Limited, Eastern Structural Division**, (Respondent), v. International Association of Bridge, Structural & Ornamental Ironworkers, Local Unions 700, 721, 736, 765 and 786, (Intervener #1), v. Canadian Workers Union, (Intervener #2), v. Employees, (Objectors).

**Termination – Timeliness – Trade Union Status – Whether one day strike of some employees sufficient to trigger section 53(3) bar – Whether applicant a trade union.**

**Before:** Ian C.A. Springate, Vice-Chairman, and Board Members H.J.F. Ade and E. Boyer.

**APPEARANCES:** *D.K. Gray and C. Clement for the applicant; Edward T. McDermott and J.R. Hassell for the respondent; Gary Perly, Larry Haiven and Ralph Ellis for intervener #2; Claude Brown for the objectors.*

**DECISION OF IAN C.A. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER H.J.F. ADE:** June 14, 1977.

1. This is an application for certification wherein the applicant is seeking to be certified to represent a unit of employees currently represented by intervener #2 (hereinafter referred to simply as "the intervener").

2. This matter originally came on for hearing before a differently constituted panel of the Board. That panel, however, dealt only with one preliminary issue raised by the intervener, namely its claim that this application was untimely due to the existence of a collective agreement between itself and the respondent. The panel which heard this issue issued a decision dated February 22, 1977 in which it held that no collective agreement was in existence which would serve as a bar to the application.

3. When this matter came on before this panel of the Board the representative of the intervener objected to the panel hearing the case, contending that the original panel should have remained seized of the matter until its conclusion. We were informed by counsel for the applicant that no objection had been raised at the first hearing when the original panel indicated that it would be dealing only with the preliminary issue referred to above and that a differently constituted panel might be substituted for it to hear the remainder of the case. It was the oral ruling of this panel that it would, in fact, hear and determine the remaining outstanding issues between the parties. This ruling was based on the panel's view that the preliminary matter already dealt with was a separate and distinct issue which did not relate to any of the other matters still in dispute between the parties. This being the case there appeared to be no valid reason as to why this panel could not hear and determine the issues still outstanding.

4. The representative of the intervener did raise one preliminary objection to the application before this panel. This objection was based upon the intervener's claim that the application was untimely due to the operation of section 53(3) of the Act. Sections 53(1) and (3) state as follows:

53. – (1) Subject to subsection 3, where a trade union has not made a collective agreement within one year after its certification and the Minister has appointed a conciliation officer or a mediator under this Act, no application for certification of a bargaining agent of, or for a declaration that a trade union no longer represents, the employees in the bargaining unit determined in the certificate shall be made until,

- (a) thirty days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator; or
- (b) thirty days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board; or
- (c) six months have elapsed after the Minister has released to the parties a notice of a report of the conciliation officer that the differences between the parties concerning the terms of a collective agreement have been settled,

as the case may be.



(3) Where a trade union has given notice under section 13 and the employees in the bargaining unit on whose behalf the trade union was certified as bargaining agent thereafter engage in a lawful strike or the employer lawfully locks out such employees, no application for certification of a bargaining agent of, or for a declaration that the trade union no longer represents, the employees in the bargaining unit determined in the certificate shall be made,

- (a) until six months have elapsed after the strike or lock-out commenced; or
- (b) until seven months have elapsed after the Minister has released to the parties the report of the conciliation board or mediator or a notice that the Minister does not consider it advisable to appoint a conciliation board.

5. The intervener was certified by this Board on January 22, 1976. During the course of the negotiations between the respondent and the intervener for a first collective agreement, the Minister of Labour appointed a conciliation officer to assist them in their deliberations. The conciliation officer, however, was unable to assist the parties to effect a collective agreement, and on or about September 17, 1976 the Minister notified the parties that she did not consider it advisable to appoint a conciliation board. This being the case the employees affected by this application were in a legal position to strike, and the respondent in a legal position to lock them out, on or about October 4, 1976. A strike however, lasted only one day, being characterized, at least in part, as a form of participation in the "day of protest" against the federal government's anti-inflation program.

6. It was on the basis of this one day strike that the representative of the intervener based his claim that this application, which was filed on February 7, 1977, was untimely. It was his contention that since the employees had engaged in a lawful strike on October 14, 1976, the intervener's bargaining rights were protected for a six months period starting on that date. Counsel for both the applicant and the respondent, however, took the position that the six month period was applicable only so long as a strike was still being engaged in. Basically the dispute between the parties centered around the meaning to be placed on the phrase "thereafter engage in a lawful strike" in section 53(3).

7. At the hearing we rejected the argument put forward by the intervener and found the application to be timely.

8. Our decision in this regard was based in part on the fact that the phrase "thereafter engage in a lawful strike" is worded in the present tense. However, in that the meaning to be given to the phrase is not all that clear we also sought to examine the time limits set forth in subsection (3) of section 53 in the context of the more general subsection (1). It is clear from the wording of subsection (1) that it is that subsection which sets forth the general rules concerning the timeliness of applications to displace a certified union which has not entered into a collective agreement, and that subsection (3) acts as but an exception to those rules.

9. The effect of subsection (1) of section 53 is to ensure that a newly certified trade union will remain immune from any application to terminate or displace its bargaining rights for a period of one year from the date of its certification. The one year period will, if necessary, be extended so as to also ensure that during the conciliation process and for a period of thirty days thereafter this immunity will remain in effect. The purpose of these provisions is, in our view, to allow a newly certified trade union a period of at least one year, extended if necessary to encompass the conciliation process, in which to carry out the often difficult and time-consuming task of negotiating a first collective agreement without at the same time having to concern itself with possible applications to terminate or displace its bargaining rights. The corollary to this, however, is that once a year has gone by and thirty days have elapsed from the end of the conciliation process without agreement having been reached as to the terms of a collective agreement, then, absent any consideration of subsection (3), the employees in the bargaining unit are entitled, if they so wish, to either terminate the union's bargaining rights or to select a new bargaining agent.

10. What then is the purpose and effect of the subsection (3) exception to the above referred to general rules? We see the purpose of subsection (3) as being to insure that notwithstanding the general time limits contained in subsection (1), if a union actively engages in an economic struggle with an employer through a strike or lock-out then for a period of at least six months (or, if applicable, seven months from the end of the conciliation process) all of its' energies can be concentrated on that struggle free from concerns as to the security of its bargaining rights. Such being the case, it appears to us that once a strike has come to its conclusion then the additional protections set out in subsection (3) are, in fact, no longer required. On this basis we concluded that the time limits referred to in subsection (3) are applicable only so long as a lawful strike or lock-out are continuing. Put another way, a newly certified trade union is immune from any applications to terminate or displace its bargaining rights for a period of one year plus any time required for the completion of the conciliation process and an additional lapse of thirty days. If, however, at the end of this time period no collective agreement has been negotiated, and the union and the employer are not engaged in a strike or lock-out in an attempt to compel the other side to agree on the terms of an agreement, then an application such as this is timely.

11. The logic of the approach we have adopted with respect to section 53 is, we feel, illustrated by the facts of the case before us. At the time of the filing of the application the intervener had already been the bargaining agent for the respondent's employees for over a year and the conciliation process had been completed four months earlier. Despite this the employees were still not working under a collective agreement. Further, apart from the October 14th work stoppage (almost four months earlier) the intervener was not seeking through a strike to force the respondent to reach agreement on the terms of a collective agreement. In such a situation it appears only reasonable that employees be given at least an opportunity to decide whether or not they still wish to remain represented by the intervener.

12. Apart from the issue of the timeliness of this application in so far as it might be affected by the strike of employees on October 14, 1976, the representative of the intervener also noted that a mediator had been appointed to assist the parties on October 1, 1976 and that the mediator had not issued any report. The attention of the Board in this regard was drawn to the statement in section 53(1) that no application such as this could be made until thirty days have elapsed after the Minister has released the report of a mediator.



13. We are of the opinion that the “mediator” appointed to assist the respondent and the intervener was not a mediator as that term is employed in the Act. In our view the reference in section 53 to a mediator is to a mediator appointed “under this Act”, that is appointed pursuant to the provisions of section 16 of the Act. Such a mediator is one who is appointed at the request of the negotiating parties in place of or to replace a conciliation officer. Section 16 specifically stipulates that a mediator can only be appointed prior to the parties being informed by the Minister that she does not consider it advisable to appoint a conciliation board. Here by the time the “mediator” had been appointed to assist the negotiating parties the Minister had already released a “no board” report. Thus we are of a view that no mediator had been appointed within the meaning of section 53(1) and hence there was no requirement that a mediator’s report be released prior to an application such as this being made. (In this regard we feel we can take notice of the fact that from time to time the Ministry of Labour makes available “mediators” to assist employers and trade unions in their negotiations subsequent to the release of a “no board” report. In this way third party assistance can be provided in the period immediately prior to a lawful strike or lock-out and even after such a strike or lock-out has begun.)

14. This being the first application for certification filed by the applicant, the Board informed the applicant that it would have to establish its status as a trade union within the meaning of section 1(1)(n) of the Act. Section 1(1)(n) defines a trade union in the following terms:

“trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national or international trade union and a certified council of trade unions.

15. The intervener raised certain allegations which, if proven, would call into question the applicant’s claim to be an “organization of employees”. The intervener also relied on these same allegations in support of its claim that the Board was prohibited from certifying the applicant due to the provisions of section 12 of the Act, the relevant portion of which states:

The Board shall not certify a trade union if any employer or employers’ organization has participated in its formation or administration or has contributed financial or other support to it.

Having regard to the apparent interrelationship between the issues of the applicant’s status and the applicability of section 12, the Board ruled over the objections of the applicant and the respondent that it would hear all of the evidence as it related to both issues at the same time. During the course of hearing this evidence, which took up some seven days, the Board was called upon to make countless procedural rulings, a number of which the representative of the intervener requested that the Board put in writing.

16. One of the Board’s first procedural rulings concerned the relevancy of many of the allegations filed by the intervener. These allegations related not to the applicant in these proceedings but rather to the relationship between the respondent and the intervener, and, in particular to certain alleged episodes wherein the intervener contended that it and its supporters had been dealt with improperly by the respondent. Most of these alleged episodes



were stated to have occurred prior to the applicant even coming into existence and most, if not all of them, had already been the subject matter of unfair practice complaints before the Board. (Indeed in its allegations the intervener referred the Board to a total of nine unfair labour practice complaints which it had filed against the respondent.) The unanimous ruling of the Board was that it would not hear evidence in support of those particulars which did not relate in some way to the status of the applicant or to possible management support of the applicant. The Board's decision in this regard was based upon the view that no matter what the past relationship between the respondent and the intervener, the fact of such a relationship by itself would not be sufficient to deny either the applicant of the right to be certified or the employees supporting the applicant of their right to seek to have the applicant become their bargaining agent. Indeed if the allegations raised by the intervener relating to its ongoing relationship with the respondent were sufficient to deny the applicant the right to be certified, then likewise they would appear to be sufficient to forestall the replacement of the intervener by any other trade union.

17. The Board on a number of occasions disallowed questions being put to witnesses concerning matters which the Board felt had been covered by its ruling referred to in the preceeding paragraph. One such ruling was of particular concern to the representative of the intervener. This ruling arose out of attempts by the representative of the intervener to question Mr. C. Clement, the President of the applicant, concerning two letters which had been issued "to all plant employees" by the respondent. These letters, dated January 14, 1977 and January 20, 1977, comment upon certain leaflets which had been issued to employees by the intervener and also upon the respondent's position with respect to negotiations with the intervener. The letter of January 14th also makes reference to a bargaining in bad faith complaint which had been filed by the intervener with respect to the respondent and to the fact that the complaint had been dismissed by the Board following a motion by the intervener to have it withdrawn. The Board's decision not to allow questions concerning these letters, and for that matter not to allow the letters to be placed into evidence, was based upon its view that while the letters might be relevant to the bargaining relationship between the respondent and the intervener, they were not relevant to either the issue of the status of the applicant or to the question of whether the Board was prohibited from certifying the applicant pursuant to section 12 of the Act.

18. The Board did entertain evidence led by the intervener in support of its allegations that the respondent had assisted the applicant in its organizing campaign and, more particularly, that the respondent had allowed Mr. Clement to actively sign employees into membership in the applicant on the respondent's premises notwithstanding a company rule prohibiting such conduct. We also heard evidence to the effect that the intervener's practice was to communicate with employees outside of the respondent's premises, and that on one occasion when supporters of the intervener sought to distribute leaflets on the respondent's premises they were stopped from doing so by officers of the respondent.

19. We are satisfied on the evidence that the respondent did not participate in the formation of the applicant. We are also satisfied that the respondent did not give its assistance, even indirectly, to the applicant during the course of the applicant's organizing campaign. The evidence does establish that almost all of the applicant's members were signed into membership by Mr. Clement on the respondent's premises. However, it is clear that Mr. Clement signed up employees in the respondent's lunch room and in one of its locker rooms under circumstances where they were not likely to be observed by managerial personnel. On

three or four occasions Mr. Clement “punched out” of work early so as to allow him time in which to sign up employees on the following shift as they came in to work. However, in doing so Mr. Clement followed the regular procedures established by the respondent for employees who wished to leave early, and on each occasion he was careful to mislead his foreman as to the true reason for his actions.

20. At the hearing, the intervener introduced into evidence a copy of a letter from itself to the respondent wherein it states that the intervener had become aware that Mr. Clement “is engaging in union organising activity on company premises and on company time.” Following this is the statement “we are sure that you will take appropriate action.” Counsel for the respondent took issue with the claim that such a letter had in fact been delivered. However, in that no evidence in this regard was led by counsel for the respondent we accept the evidence of Mr. Claude Brown that he delivered the original of the letter to the respondent on or about January 19, 1977. (Mr. Brown, although attending at the hearing as the representative of the objecting employees, has been the National Vice-Chairman of the Canadian Workers Union since December of 1975.) In our view this letter, standing by itself, is not a sufficient basis upon which to conclude that the respondent had given even its tacit support to Mr. Clement’s organizing activities. In particular, there is nothing in the evidence to indicate that any member of management observed Mr. Clement’s activities. Further, although Mr. Clement did engage in organizing activity on the respondent’s premises, we are satisfied that he did not engage in such activity on company time.

21. Quite apart from any support allegedly given to the applicant by the respondent, the representative of the intervener also contended that the applicant could not be certified due to the prohibition in section 12 against the Board certifying a union “if any employer had contributed financial or other support to it.” This position was based upon the testimony of Mr. Clement, wherein he stated that when he decided to form the applicant he came to the conclusion that he would require legal assistance, and that on the basis of comments made by some employees concerning the lawyer retained by the Burlington Golf Course in its dealings with the intervener trade union he telephoned the manager of the golf course to ask for that lawyer’s name. Mr. Clement was, in fact, given the lawyer’s name, but when he telephoned the lawyer the lawyer declined to act in the matter, explaining that in labour matters he acted only for the management side. This lawyer did, however, suggest the name of another lawyer who might be willing to assist Mr. Clement, and in due course this second lawyer was retained to assist in the formation of the applicant.

22. We are of the view that even if we were to accept the proposition that the reference in section 12 to “any employer” can refer to an employer whose employees are not affected by the certification application, nevertheless any connection between Mr. Clement’s phone call to the golf course and his eventual retaining of a solicitor is just too tenuous to amount to “assistance” as that term is used in section 12.

23. It follows from our findings in paragraphs 19, 20 and 22 above, that we are satisfied that the Board is not prohibited from certifying the applicant on the basis of section 12 of the Act.

24. The Board heard a good deal of testimony in relation to the manner in which the applicant was purportedly formed. Two organization meetings were in fact held, one on December 18, 1976 and the other on January 30, 1977. The first meeting took place in Mr.



Clement's home with six employees in attendance. The second meeting was held in a hall and was attended by approximately fifty-five employees. Somewhat complicating the situation is the fact that a large number of employees signed applications for membership in the applicant subsequent to the first meeting, but prior to the second.

25. We are of the view that the events which occurred at the first meeting, held on December 18, 1976, were sufficient to bring the applicant into existence as a trade union within the meaning of section 1(1)(n) of the Act. We are satisfied that at a very minimum at this meeting a constitution was adopted, pro tem officers were elected, the employees present signed applications for membership in the applicant and that having done so they then re-adopted the constitution. The constitution so adopted states that one of the purposes of the applicant is "to regulate relations between employees and their employer." The terms of the constitution generally, in our view, are suitable to an organization with this as one of its objects.

26. In determining just what occurred at the December 18th meeting we would note that we did not rely on the formal minutes of the meeting which were drafted by counsel sometime after the meeting was held. Nor did we rely on the memo prepared by counsel for Mr. Clement's use at the meeting, nor upon the notes allegedly made during the meeting by Mr. Bernardi, but never properly identified at the hearing. Instead, we relied solely upon the oral testimony of Mr. Clement and, in particular, on his recollection of events at the meeting as elicited during his cross-examination.

27. At the meeting held on January 30, 1977, the employees present again adopted the constitution in the same form as it had been adopted earlier. Elections were also held for officers to replace the pro tem executive. In our view, these actions did not affect the status of the organization which had already been established. We are also of the view that the fact that a small number of non-members attended and voted at this meeting did not have the effect of destroying the applicant's status as a trade union. (Indeed, it is clear on the evidence that the votes of non-members could not have affected the outcome of the meeting). One of the non-members attending and voting at the January 30th meeting was Mr. Claude Brown, the intervener's National Vice-Chairman. On Mr. Brown's evidence we feel we can come to no other conclusion than that Mr. Brown voted at the meeting for the express purpose of being able to raise his own actions as a ground for denying the applicant status. Indeed, during his cross-examination when asked whether he had attended the meeting with the intention of destroying the applicant if he could, Mr. Brown replied, "I guess you could say that".

28. During the course of the hearing, the representative of the intervener sought to go into the issue as to whether or not the applicant's officers had been elected in accordance with the terms of the applicant's constitution. The Board, however, ruled that such a question could not affect the issue of the applicant's status as a trade union. In the case *C.S.A.O. National (Inc) v Oakville Trafalgar Memorial Hospital Association*, 72 CLLC ¶14, 118 (Ont.C.A.), the Board in determining whether or not an applicant is a trade union was directed to restrict its inquiry only to the question set forth in the Act, namely, "is the applicant a trade union as defined in the Act"? In answering this question the Board looks to the applicant's constitution as a source of evidence of the existence of a viable organization of employees and also that one of the purposes of the organization is the regulation of relations between employees and employers. The Board concerns itself with the election of



officers only as an aid to ensuring that the organization is a viable one, capable of assuming the duties and responsibilities of a trade union under the Act. If there is an issue concerning a possible breach of the applicant's constitution in the manner in which officers were elected, the members of the applicant, as members, can raise the matter in the proper forum. In our view, it is not an issue which goes to the very existence of the applicant as a trade union.

29. During the hearing the representative of the intervener raised in rather dramatic fashion an issue which he claimed went to the Board's jurisdiction to entertain this application, and which served to prohibit the Board from finding the applicant to be a trade union. This issue related to the fact that the applicant's name, "The Employees' Association of Canron Limited", contains the word "Limited", even though it is not an incorporated entity. The Board, on the afternoon of March 22, 1977, and again at the re-continuation of the hearings on March 25th, was asked to adjourn the hearings until such time as it had ruled on its jurisdiction to entertain this application having regard to the name of the applicant. The basis for this request was essentially two fold. Firstly, there was the concern expressed by both the representative of the intervener and the representative of the objectors that the applicant might be in violation of both The Corporations Act and The Business Corporations Act, and that they by continuing to participate in the hearings might be subjecting themselves not only to possible civil liability, but also to potential criminal liability under the conspiracy provisions of the Criminal Code. The second ground was that the Board would be exceeding its jurisdiction and also be in violation of the rules of natural justice if it proceeded with the case without first determining its jurisdiction to do so. The Board, however, ruled that it would not interrupt the proceedings as requested, but that the parties could make submissions on the issue of the applicant's name along with their other submissions at the end of the presentation of evidence, and that the Board would in due course come to a decision on the matter. The representative of the intervener requested written reasons for this ruling.

30. In our view, for the Board to have acceded to the intervener's request that the Board adjourn until such time as it had ruled on the effect of the applicant's name on the Board's jurisdiction to even hear this application, would have been to needlessly disrupt the proceedings. We were of the opinion that to postpone a consideration of this issue would not act to the prejudice of any of the parties, would not amount to a denial of natural justice, and would not constitute an excess of the Board's jurisdiction. Further, we were not impressed by the argument that civil or criminal liability might attach to individuals merely because they participated in the hearings before the Board.

31. We turn now to consider the merits of the intervener's submissions with respect to this issue. Section 10 of The Business Corporations Act states:

- "10(1) The name of a corporation shall have the word 'Limited', 'Incorporated' or 'Corporation' or its corresponding abbreviation 'Ltd.', 'Inc.' or 'Corp.' as the last word thereof.
- (2) No person, partnership or association while not incorporated shall trade or carry on a business or undertaking under a name in which 'Limited', 'Incorporated' or 'Corporation' or any abbreviation thereof is used.

- (3) Where a corporation carries on business or identifies itself to the public in a name or style other than as provided in the articles, such name or style shall not include the word 'Limited', 'Incorporated' or 'Corporation' or any abbreviation thereof."

Section 259 of the Act sets out certain fines which can be levied due to breaches of the Act. Section 15 of The Corporations Act is along much the same lines; and states as follows:

- "15 A person, partnership or association that trades or carries on a business or undertaking under a name in which 'Limited', 'Incorporated' or 'Corporation' or any abbreviation thereof is used, unless incorporated, is guilty of an offence and on summary conviction is liable to a fine of not more than \$200."

32. We are of the opinion that these statutory provisions neither prohibit the Board from finding the applicant to be a trade union, nor from granting it a certificate. In our view, the term "Limited" in the applicant's name refers not to the employees association, but rather to "Canron", which is an incorporated entity, and thus no violation of either of the above statutes has occurred. We also have some doubts as to whether the applicant's activities can be characterized as a "trade or...a business or undertaking". Finally, we also feel that even if the applicant is in breach of one or both of the two statutes because of its name, this is a matter which can be remedied by the members of the applicant through an amendment to the constitution. It is not, in our view, something which would deprive this Board of its jurisdiction to hear this application or to deny the applicant the right to be certified pursuant to The Labour Relations Act.

33. Having regard to our above determinations, we find "The Employees' Association of Canron Limited" to be a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

34. The Intervener currently represents the employees of the respondent who come within the following bargaining unit, namely

"All employees of the respondent engaged in the fabrication of iron, steel and metal products, including maintenance work, in connection therewith at the respondent's shop, located at the respondent's premises in Metropolitan Toronto, save and except office, clerical and sales employees, watchmen guards, foremen and persons above the rank of foreman, students employed during the school vacation period, employees engaged in erection, installation or construction work and persons covered under subsisting collective agreements between the Ontario Erectors Association and the International Association of Bridge, Structural and Ornamental Ironworkers Local Union 700, 721, 736, 765 and 786; Canron Limited, Eastern, Eastern Structural Division and The Draftsmen Association of Ontario, Local 164, Federation of Professional and Technical Engineers (A.F.L.-C.I.O.); and The Ontario Erectors Association and International Union of Operating Engineers, Hoisting Division, Local 793."

Having regard to the agreement of the parties we find that with respect to this application the employees coming within the above description constitute a unit of employees of the respondent appropriate for collective bargaining.

35. We are satisfied on the basis of all the evidence before us, that not less than forty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on February 14, 1977, the terminal date fixed for this application and the date which we determine, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

36. A representation vote will be taken of the employees of the respondent in the bargaining unit described in paragraph 34. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

37. Voters will be asked to indicate whether they wish to be represented by "The Employees' Association of Canron Limited" or by "Canadian Workers Union" in their employment relations with the respondent.

38. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER E. BOYER**

I concur in the majority's findings that the application is timely, that the applicant is a trade union within the meaning of section 1(1)(n) and that the Board is not prohibited from certifying the applicant either on the basis of section 12 of the Act or due to the name adopted by the applicant. I do not, however, adopt the reasoning upon which the majority found the application to be timely. In my view the walk-out of employees on October 14, 1976 in protest against the Anti-Inflation Act was a political protest and, as such, could not be construed as a strike within the meaning of the Act. (In this regard see my dissent in the *Domglass Ltd.* case, [1976] OLRB Rep. Oct. 569.) This being the case I view sub-section (3) of section 53 as not even being applicable to the facts before the Board and thus I see no need to reach a conclusion as to the proper interpretation to be given to that sub-section.

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**0196-77-R** Jack P. Fogal, (Applicant), v. Toronto Typographical Union, No. 91, (Respondent), v. **CCH Canadian Limited**, (Intervener).

**Termination – Whether a statement in opposition to trade union voluntary.**

**BEFORE:** M. G. Picher, Vice-Chairman and Board Members C. G. Bourne and A. HersHKovitz.

**APPEARANCES:** C. J. Abbass for the applicant; Harold F. Caley and Jim Buller for the respondent; Tim Sargeant for the intervener.



**DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER C. G. BOURNE: June 27, 1977.**

1. This is an application under section 49 of The Labour Relations Act for a declaration that the respondent no longer represents the employees of the intervener in the bargaining unit for which it is the bargaining agent.

2. The respondent has held bargaining rights in respect of

“All employees of CCH Canadian Limited at Metropolitan Toronto engaged in composing room work, including Typesetters, compositors, stonemen and proofreaders, save and except non-working foremen and persons above the rank of non-working foreman.”

3. The applicant filed a timely statement of desire signed by some 21 persons, 20 of whom are among the 38 employees described by the employer as being in the bargaining unit. If the statement of desire was inspired and circulated in circumstances that would establish that the signatures were voluntarily given the Board would cause a representation vote to be taken among the employees in the bargaining unit.

4. The statement of desire is on a single page entitled “*Petition in Support of Termination of Bargaining Rights*” and the following preamble appears above the signatures:

WE, the undersigned, no longer wish to be represented by TORONTO TYPOGRAPHICAL UNION NO. 91. We freely and voluntarily sign this document, knowing it will be used to make an application to The Ontario Labour Relations Board for a declaration that the TORONTO TYPOGRAPHICAL UNION NO. 91 no longer represents the employees in the bargaining unit for which the union is the bargaining agent at C.C.H. CANADIAN LIMITED, 6 GARAMOND COURT, DON MILLS, ONTARIO.

5. Jack Fogal and Michael Hay, two employees in the bargaining unit, testified as to the circumstances surrounding the origination and circulation of the petition. Mr. Fogal, an employee of 26 years standing, admitted having been opposed to the union since its certification. He testified that as a result of conversations with fellow employees he determined that a sufficient group of them were interested in having the respondent's right to represent them brought to an end. He then got in touch with legal counsel with whom he had previous dealings. His counsel drafted the petition and instructed him, as well as Mr. Hay and a Mr. Kenneth Renshaw, another employee, as to the manner in which it should be circulated and kept prior to the filing of the application.

6. It was circulated by Mr. Hay and Mr. Renshaw, both of them being present when all signatures were obtained. Hay and Renshaw took the petition directly from the office of Mr. Fogal's counsel on the 26th of April, 1977 and returned it to counsel at his home on the evening of the next day. A good number of signatures were obtained in that time as a result of considerable telephone campaigning done by both Mr. Fogal and Mr. Hay in the weeks previous. Fogal, Hay, Renshaw and another employee signed the petition at Mr. Fogal's home immediately after leaving the lawyer's office. Then Mr. Hay and Mr. Fogal obtained

the signature of another employee at the Toronto General Hospital. Mr. Hay arranged for employees on the night shift to meet him at a shopping plaza near the plant on the night of the 26th, during their lunch break at which time they signed the petition. Another employee signed at Mr. Hay's home the next morning, and a further group signed the petition off the plant premises during the lunch hour on the 27th of April, 1977 and the last two signatures were obtained on the shopping plaza mentioned above after work on that day.

7. The Board is satisfied on the balance of probabilities, that there is nothing in the circumstances immediately surrounding the origination and circulation of the petition to establish that it is not the voluntary expression of the wishes of the employees who signed it.

8. Counsel for the respondent asked the Board to conclude otherwise on the basis of a number of isolated incidents and facts in evidence. He submits that a pattern of events involving the employer has had the effect of creating a climate in which a termination application would inevitably arise and succeed. In other words, he argues that even if the employer has not been shown to be directly involved or to have had a direct influence on the origination and circulation of the petition its actions must be seen as the catalyst to this application. Among other things counsel cites the open opposition of the employer to the union and the fact that it used to hire employees through the union's hiring all and ceased to do so after the certification. He points to the fact that the employer hired at least three new employees from a competitor employer that is not unionized and that Mr. Hay, who was recruited earlier from the same source, was paid a reward, pursuant to a general company policy, for attracting and recommending those employees. He submits that as the signatures of those new employees were obtained by Mr. Hay they should not be found to be voluntary because being the person who recruited them, Mr. Hay should be seen as being in a position to affect their employment status so that they could not refuse to sign. He further points to an exchange between the employer and the representative of the union which occurred in April in which the employer representative commented that bargaining would take place so long as the union's bargaining rights were not terminated.

9. While the Board has found that the actions of an employer can be a sufficient catalyst to a statement of desire so as to cast doubt on its voluntariness (e.g. *Mitten Industries, Galt, Limited* [1975] OLRB Rep. Mar. 154) each case must be determined on the strength of its own particular facts. In assessing the reasonable or probable impact of an employer's actions upon the ability of a group of employees to freely express their wishes in respect of union representation, the Board must have regard to the proximity or remoteness to the statement of desire of the employer's actions. In the *Mitten Industries* case a strongly worded speech delivered to a virtually captive audience of employees by the president of an employer company was found to have contributed to the inspiration and wide acceptance by the employees of a petition circulated among them in the days immediately thereafter. In that case the Board could reasonably infer a sufficient causal relationship between the action of the employer and the subsequent statement of desire so as to call into question its voluntariness.

10. In the instant case the union points to a collection of events scattered over a considerable period of time. Those events may or may not be related. Whether they be viewed individually or collectively we find it impossible to draw from them any firm inference that the employees who signed the statement of desire were, on the balance of probabilities, deprived of their ability to freely choose whether or not to do so.

11. The Board is, therefore, satisfied that more than forty-five per cent of the employees of CCH Canadian Limited in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent union on May 9, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the said Act.

12. The Board directs that a representation vote be taken of the employees of CCH Canadian Limited. Those eligible to vote are all employees of CCH Canadian Limited in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

13. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with CCH Canadian Limited.

14. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER A. HERSHKOVITZ**

1. This is an application for termination and I regret that I cannot agree with the decision reached by the majority.

2. The parties before us today are no strangers to the Board. This is only the latest application arising out of a turbulent employer/employee relationship. Mr. Fogal himself has been adamantly opposed to the trade union from its initial certification. He was a party to a petition in opposition to the union at that initial hearing. He has opposed the ratification of the proposed collective agreement – not because he was seeking a better agreement but rather because he sought no agreement at all. Mr. Fogal has also been involved in proceedings before this Board against the respondent trade union. In all of these matters, of course, Mr. Fogal's position in opposition to the union is similar to that of the employer. This identity of interest is not in itself fatal to his application, since this identity of interest will occur wherever a group of employees remains adamantly opposed to the trade union; however, the Board is charged with determining whether a petition in support of a termination application is voluntary and it must be scrupulous where there is a reasonable likelihood that the persons circulating the petition would be identified with management. In this respect the Board must take particular cognizance of the Preamble to the Act which indicates the legislature's intention to "further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees".

3. There is no dispute between us as to the applicable law. The Board must be satisfied that the statement of desire represents the voluntary expression of the employees who signed it, and the burden of proof is upon those who seek to rely on that petition (see *Secord Manufacturing Ltd.* [1975] OLRB Rep. Sept. 658). In a recent case between these same parties the Board remarked (citing the *Pigott Motors* case 63 CLLC 16,264):



"... There are certain facts of labour management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act."

4. In pursuing its inquiry the Board is not confined to a consideration of actual management involvement, but is concerned with what the employees signing the petition could reasonably have believed. In this respect it is necessary to examine all the circumstances in which the petition was circulated; and in this case, those circumstances include a pattern of anti-union conduct on the part of the originator of the petition. As was noted in the *Dad's Cookies* case, [1976] OLRB Rep. Sept. 545, the Board must be concerned with the cumulative effect upon employees of all the facts and circumstances surrounding the circulation of the petition. While that case involved a petition in opposition to the trade union's certification, the principles and standards which the Board applies are the same. See *C.C.H. Canada Ltd.* [1975] OLRB Rep. Jan. p. 19 at p. 25 where the Board remarked:

"As one deduces from reading the *Remington Rand Limited* case the Board applies the same standards to the evidence supporting an application for termination as it applies to petitions in opposition to a trade union that arise during the certification procedures. This position is outlined in *Riel and Int. Bro. of Teamsters Local 230* (known as the *Harry Haley & Sons* case) 58 CLLC ¶18,106 where the Board described its approach in the following way:

The Board has consistently held that like principles should be applied to the documents filed in support of applications by employees for termination of bargaining rights. In other words the Board has taken the position that even though a majority of the employees in the bargaining unit have signed a document purporting to be an expression of their wishes that they no longer wish to be represented by a trade union, there may be circumstances surrounding the origination or circulation of the document or documents in question which do not make it incumbent on the Board to direct a representation vote.

In fact the use of the word 'voluntary' in section 49(3) seems to be a specific legislative direction to the Board to inquire into the history of ostensible wishes of those employees subscribing to an application for termination; (see *P. Chapman Cartage Ltd.* [1972] OLRB Jan. 356).

5. Apart then from the long-standing opposition of Mr. Fogal, what are the facts of this case? Mr. Fogal himself was the initiator of the petition together with a Mr. Hay with whom he collaborated. Mr. Fogal testified that he delegated the task of soliciting signatures

to Mr. Hay because he feared that his past activities as an anti-union petitioner might taint the present petition. He advised the Board that he used a Christmas list in order to phone people prior to the circulation of the petition. Mr. Hay, however, testified that it was he who arranged meetings with the signatories by telephone but that there had, in fact, been no list. There was evidence that at least one person (a Mr. Roth) who had been involved in a previous petition was subsequently given a promotion. Mr. Hay himself has also been recently "rewarded". He admitted that he had received payments from the employer following the hiring of four employees who it was admitted were not union supporters. It was suggested that this was a normal hiring bonus, however, Mr. Hay advised the Board that he was not involved in recruiting these employees and first became aware of their employment when they came through the door. Mr. Buller, president of the union, testified that although C.C.H. used to hire employees from the union's hiring hall, they had ceased to do so following certification.

6. As I have already indicated, the onus is upon the persons seeking to rely on the petition to demonstrate that it is voluntary and this onus is a particularly heavy one where, as here, there would be a natural tendency for employees to regard the petition as management inspired. Having regard to the inconsistencies in the evidence, I cannot find on the balance of probabilities that the employees have voluntarily indicated their opposition to the union since in my view it is inevitable that they would regard the petition as emanating from their employer. In the result, therefore, I would dismiss the application.

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**0053-77-U** Toronto Typographical Union No. 91, (Complainant), v. **C C H CANADIAN LIMITED**, (Respondent).

**Section 79 – Timeliness – Practice – Procedure – Whether long delay in filing complaint a bar.**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

**APPEARANCES:** *James Buller, Emil Rossenthal and Michael Diamond for the applicant; Tim Sargeant and Ron Griffiths for the respondent.*

**DECISION OF THE BOARD:** June 20, 1977.

1. This is a complaint filed pursuant to section 79 of The Labour Relations Act in which the complainant alleges that in March of 1976 the respondent by its refusal to employ the grievor, Mr. Gerrit Quelle, acted contrary to section 58 of the Act. The complaint makes reference to the time lapse between the alleged violation of the Act and the filing of the complaint in the following terms:

“Delay in filing earlier complaint due to union being able to place Mr. Quelle in other temporary employment at trade.”

2. At the hearing counsel for respondent by way of a preliminary motion requested that the Board not inquire into the complaint due to the time which had elapsed since the occurrence of the events complained of. In response to questions from the Board the representative of the complainant stated that the grievor had not been accepted for employment with the respondent in March of 1976 and that the grievor had not contacted the respondent again since that time. The complainant's representative further indicated that a number of employees had been hired by the respondent since the grievor had been refused employment, and that the complainant union had been aware of these hirings within a short time after they occurred. It is worth noting that the complainant trade union was certified by the Board to represent the employees of the respondent in January of 1976 (see File No. 1332-75-R), and that the parties entered into a collective agreement during August of 1976.

3. The Board as a general rule will not refuse to entertain a complaint under section 79 only because of a delay in lodging the complaint. Where unreasonable delay has occurred, the Board in most cases will simply take this factor into account in assessing any compensation which might be awarded. In the instant case, however, we are of the view that because of the extreme delay in the filing of the complaint and, in the circumstances, the lack of any mitigating factors which might justify or excuse such a delay, the Board should exercise its discretion under section 79 of the Act and refrain from inquiring into the complaint.

4. If a union feels that one of its members has not been hired because of his union membership, it is open to the union to file a complaint against the employer alleging a violation of section 58 of the Act and requesting that the Board fashion an appropriate remedy utilizing its wide remedial powers under section 79(4). Upon the Board inquiring into such a complaint the burden of proof lies upon the employer to show that its actions did not constitute a violation of the Act. (In this regard see section 79(4a) of the Act and also *I.C.B. Warehousing Division of Alar-Anson* [1976] OLRB Rep. Oct. 621). A union cannot, however, delay indefinitely the filing of such a complaint. Similarly it cannot decide at the time of its occurrence that a particular incident does not warrant the filing of a complaint and then much later in time change its mind and seek to resurrect the matter.

5. Having regard to the above, the Board hereby affirms its oral ruling at the hearing wherein it declined to inquire into the complaint. These proceedings are hereby terminated.

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**0013-77-U** Christian Labour Association of Canada, (Complainant), v. **Local 593 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada et al** (See attached Schedule "A"), (Respondents).

**Strike – Practice – Procedure – Whether a party seeking a cease and desist direction may afterwards amend its complaint to add a claim for damages.**

**BEFORE:** D. H. Kates, Vice-Chairman, and Board Members D. B. Archer and J. D. Bell.

**APPEARANCES:** *W.R. Herridge, Q.C., John Kamphof and Ed Grootenboer for the applicant; J.K. Martin for the respondent Local 593; Stephen Holland for the respondent E.S. Martin Ontario Ltd.; Peter Van Arnhem for the respondent V.A. Mechanical Systems Limited.*

**DECISION OF THE BOARD:** June 23, 1977.

1. This is a complaint filed under section 79 of the Act alleging that the respondents for reasons particularised in the complaint violated section 61 of the Act. The request for relief made is for an order directing the respondents to cease and desist from engaging in their alleged unlawful activity.

2. The circumstances giving rise to this complaint are relatively straightforward. On June 7, 1976 the respondent, namely J. K. Martin in his capacity as business agent and representative of Local 593 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (hereinafter referred to as "Local 593"), consented to an Order of this Board directing that Local 593 cease and desist from interfering with the bargaining rights of the complainant Christian Labour Association of Canada (hereinafter referred to as "CLAC") in its representation of employees engaged by A.K.A. Mechanical Contractors Limited. In that case as in the case presently before the Board A.K.A. was sub-contracted to perform a portion of the mechanical work on a project in London, Ontario for the contractor, V. A. Mechanical Systems Limited. V. A. Mechanical filed an appearance at the initial hearing scheduled in this matter but failed to attend the second day of hearing indicating by letter dated May 30, 1977 that "we feel all pertinent evidence, as it affected our company's involvement in these matters, were brought out at the first hearing." The consent order granted by the Board reads as follows:

"1. This is a complaint brought under section 79 of the Act in which the complainant alleged that the respondents had violated sections 61 and 3 of the Act. The Board convened a hearing in this matter on Tuesday June 1, 1976 in London, Ontario. At the outset of that hearing the complainant asked if the Board would grant a recess in order to permit the parties to discuss this matter. The Board agreed and upon the reconvening the hearing was informed that the parties were in agreement as to the disposition of this matter.

2. Having regard to the agreement of all the parties to this matter, as confirmed individually by each of the parties, the Board orders that the respondents and any person having notice of this order to cease and de-

sist from interfering with the rights of members of the complainant, employees of A.K.A. Mechanical Contractors Limited, from exercising their right to join a trade union of their choice and to participate in its lawful activities.

June 7, 1976

'Kevin M. Burkett' for the Board"

3. The general contractor in this case and named respondent, E. S. Martin Construction (Ontario) Limited, sub-contracted with V. A. Mechanical to perform the mechanical work on an A & P Store project in London, Ontario. On March 17, 1977 the plumbing portion of the mechanical work was sub-contracted by V. A. Mechanical to A.K.A. Mechanical. At all material times A.K.A. Mechanical was bound by a collective agreement between it and "CLAC" with respect to the terms and conditions of employment of its employees. A few days prior to the events precipitating the filing of this complaint employees of A.K.A. attended the job site for the purpose of making preparations for the performance of the sub-contract. Following their appearance, on the morning of March 29, 1977 several business agents representing trade unions belonging to the London Building Trades Council congregated on the periphery of the job site. Mr. Ken Martin was identified by a number of witnesses called by the complainant as being amongst them. Mr. Martin did not take the stand to contradict or otherwise explain his whereabouts at the time in question. In any event, the uncontradicted evidence shows that work on the job site came to a halt between March 29, 1977 and April 4, 1977.

4. The general contractor, E. S. Martin became quite concerned about the delay to the job's progress arising out of the work stoppage. Mr. Holland, project manager in the employ of E. S. Martin, attested to several telephone conversations with Mr. Martin where it was communicated in a very "elliptic" fashion that the problem on the job site pertained to the presence of a non-A.F.L. contractor. As a result of these conversations the message was dispatched to V. A. Mechanical that something would have to be done about A.K.A.'s presence on the job site. Mr. Peter Van Arnhem, owner of V. A. Mechanical, testified that he was advised by the general contractor that AKA would have to be removed from the job site. He indicated that as a condition to subcontracting the plumbing work to AKA Mechanical he was assured that in the event of labour difficulties AKA would agree to vacate the site. Indeed, on April 4, 1977 Morris Plumbing and Heating Ltd. of Stratford, an ALF contractor, replaced AKA on the job site and assumed the work initially sub-contracted to AKA. On that very day the work stoppage terminated.

5. Mr. Holland testified that in early February 1977 he spoke to Mr. Tiefenback, regional representative of the Construction Labour Relations Association for South Western Ontario, who requested a list of employer contractors on the A & P Food Store job site. Mr. Tiefenback confirmed that he had made the request. The latter was approached by Mr. John Harrower, President of the London Buildings Trade Council, for the information. It was clear from the testimony of Mr. Tiefenback that these requests are in the ordinary course and the Association, as a matter of practice, co-operates with the Labour Council in securing the lists from the general contractor assigned to a construction project where members of the Council would have an interest. One of the practical purposes for securing the lists related to us by Mr. Tiefenback was in order to arrange pre-job meetings with a view to avoiding jurisdictional disputes. Although this may very well be one of the purposes, it would be less than prudent for the Board not to infer that another purpose was to enable



measures to be taken to purge non-AFL Contractors from any job site where the members of the London Building Trade Council was affected. Indeed, Mr. Harrower in his examination admitted this to be the main purpose of the lists. He suggested, however, that the problem the Building Trades Council was concerned with at this particular job site was the bricklaying contractor, Classic Tile Ltd. In any event, Mr. Hollander supplied Tiefenback with the list of contractors on the A & P job site and this list was relayed to Mr. Harrower.

6. On March 29, work on the A & P job came to a stop. The work stoppage was coincidental with Mr. Martin's presence along with his colleagues from the Building Trades Council at the job site that morning. On April 4, 1977 work at the project resumed coincidentally with the replacement by Morris Plumbing and Heating Limited of AKA Mechanical as the plumbing sub-contractor. Mr. Harrower explained that he knew nothing of Mr. Martin's involvement in the concerns of the mechanical contractor on the job site. Their concern was with the presence of Classic Tile. Nonetheless, his diary indicated that he and his colleagues were present at the job site on March 29th for the purpose of dealing with a non-union contractor. He could not explain to the Board the reason why work resumed on April 4 when it was decided that AKA Mechanical be replaced. Yet to this day he could not state that the problems encountered with Classic Tile had been resolved. Mr. Harrower simply appeared to us to be an unworthy witness whose testimony is not deserving of any credit. Mr. Martin in failing to take the stand confirmed in our view the bankruptcy of the respondent's conduct in that no practical justification was forthcoming for the extra legal activities resorted to by the respondents.

7. Indeed, although the Board was deprived of the benefit of Mr. Martin's evidence, he did indicate in his argument that the respondents were seeking to enforce "the no sub-contracting clause" contained in its collective agreement with E.A. Martin, the general contractor. The Board asked Mr. Martin to explain the reason why members of the Building Trades Council would not have recourse to the arbitration of its dispute with the general contractor under section 112(a) of the Act, a procedure designed to provide immediate relief for alleged wrongdoings of this nature. Mr. Martin replied that he, in his capacity as a member of The Ministry's Construction Industry Review Panel, had no confidence in the efficacy of that remedy. The obvious inference to be concluded by the Board from Mr. Martin's remarks was that recourse to illegal activity of a coercive nature was more effective in achieving the respondent's objectives. Through the co-operation of the respondent contractors, namely E.S. Martin (Ontario) Ltd. and V.A. Mechanical Ltd., Local 593 has been able to attain its objectives of denying members of the applicant trade union the freedom to join a trade union and participate in its legal activities. The Board simply cannot condone these patently illegal activities, designed to deprive the citizenry of this Province of the representative rights enshrined in The Labour Relations Act.

8. The Board on the basis of the uncontradicted evidence adduced at the hearing finds that the respondents are in violation of Section 61 of the Act and directs that:

1. The Respondents to forthwith permit A.K.A. Mechanical Contractors Limited to perform its obligations under its purchase order contract dated the 17th of March, 1977.
2. The Respondents and any person having notice of such order to cease and desist from interfering with the contractual relation



which exists between the Respondent V. A. Mechanical Ltd. and A.K.A. Mechanical Contractors Limited.

3. The Respondents and any person having notice of such order to cease and desist from interfering with the right of members of the Complainant, employees of A.K.A. Mechanical Contractors Limited, from exercising their right to join a trade union of their choice and to participate in its lawful activities.
4. The Respondents and any person having notice of such order to cease and desist from interfering with the right of the Complainant to act as the bargaining agent of all plumbers and plumbers apprentices of A.K.A. pursuant to its collective agreement dated April 1, 1976.

9. The Board reluctantly must deny the Complainant's request to amend its complaint to allow in it, as a claim, for relief compensation arising out of the respondent's wrongdoings. We cannot apologize for the protraction of these proceedings the effect of which is to leave the complainant with an empty direction. The Board was informed that the project is in fact approaching completion. Nevertheless, it was in the complainant's discretion to request damages at the time it filed its complaint and it failed, for reasons never explained to the Board, to do so. This case was prolonged because the Board, through its scheduling procedures, could not proceed with the second day of hearing originally set aside because of the commitment of Board member Archer to another case. The Board simply cannot accede to the complainant's request to amend its claim to relief for reasons plainly attributable to the Board's scheduling procedures. In other words, a party to our process cannot be penalized for delays occasioned by the Board, however inequitable that may appear to the party prejudiced. And, in any event, we repeat, it was within the complainant's discretion, notwithstanding the absence of delay on its part in filing its complaint to request compensation in the first instance for the wrongdoings committed by the Respondents as alleged in its complaint.

### SCHEDULE "A"

#### NAMES AND ADDRESSES OF RESPONDENTS

1. Local 593 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, 523 First Street, London, Ontario.
  2. J. Kenneth Martin, 523 First Street, London, Ontario.
  3. E.S. Martin Ontario Limited, 3195 Erindale Station Road, Mississauga, Ontario.
  4. V.A. Mechanical Systems Limited, 2446 Cawthra Rd., Cooksville, Ontario.
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**1500-76-R** Amalgamated Clothing and Textile Workers Union Toronto Joint Board, (Applicant), v. **Dylex Limited**, (Respondent), v. Group of Employees, (Objectors).

**Certification – Section 79 – Whether employer unfair labour practices sufficient to justify certification without vote under section 7a.**

**BEFORE:** Ian C. A. Springate, Vice-Chairman and Board Members H. J. F. Ade and E. Boyer.

**APPEARANCES:** *Martin Levinson, James Hayes and T. DuCharme for the applicant; E. L. Stringer, Q.C. and G. Leverenz for the respondent; Iberia Marques, Carmelia Medeiros, Vincent Campbell and Raymond Klapstein for the objectors.*

**DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER E. BOYER.** June 29, 1977.

1. This is an application for certification in which a differently constituted panel of the Board directed the taking of a representation vote. The vote was conducted on January 25, 1977. The report of the returning officer indicates that less than fifty per cent of the ballots cast in the representation vote were cast in favour of the applicant. Following the taking of the vote and the release of the results of the balloting, but prior to the time set for the filing of representations with respect to the vote, the applicant alleged that the respondent through certain of its actions had violated section 56 of the Act and that as a result the results of the representation vote did not represent the true wishes of the employees. The applicant also requested that it be certified by the Board pursuant to section 7a of the Act.

2. Subsequent to the hearing held with respect to the applicant's request that it be certified pursuant to the provisions of section 7a, counsel for the respondent filed certain submissions with the Board. In these submissions counsel contended that in addition to the reasons he had raised at the hearing the applicant should not be certified pursuant to section 7a in that the applicant had failed to raise its allegations with the Board prior to the taking of the vote but had instead waited until after the results of the vote had been made known. In support of this position counsel referred the Board to its decision in *Chateau Gardens (London) Inc.*, [1977] OLRB Rep. Jan. 12. The *Chateau Gardens* case involved a representation vote held between two competing trade unions. Certain pre-vote propaganda distributed by one of the unions had not been removed from the employer's premises at the onset of the 72-hour "silent period" directed by the Registrar but rather had remained posted on several bulletin boards as well as in a staff lounge. The union which had failed to remove its propaganda was the choice of a majority of the employees who cast ballots. Subsequently the unsuccessful union on the basis of the other union's violation of the silent period requested that the Board set aside the results of the vote and direct the taking of a second vote. The Board, however, refused to accede to this request on the grounds that the complaining union should have raised the fact of the breaches of the silent period prior to the actual taking of the vote.

3. We are of the opinion that the principle enunciated in the *Chateau Gardens* case is not applicable to the case before us. As the Board noted in the *Chateau Gardens* case, the

purpose of the 72-hour silent period is to insure fairness in the conduct of the vote. This it does by providing employees with a 72-hour respite from all manner of persuasion. If a party does issue any pre-vote propaganda during this time period, then the Board may well decide to remedy the breach of the silent period by putting aside the result of the vote and directing the taking of a second vote. (See: *Wackenhut of Canada Limited*, [1975] OLRB Rep. Oct. 738.) In the *Chateau Gardens* case, however, the Board was of the opinion that the unsuccessful union had been aware of the breach of the silent period in sufficient time prior to the taking of the vote that had it raised the matter with the Board adjustments could have been made, such as the rescheduling of the vote to a later date, so as to effectively compensate for the breach. Because of the union's failure to do so, however, the Board declined to direct the taking of a second vote. In the instant case the central issue does not centre around the taking of the vote itself. Rather the applicant is alleging that certain of the respondent's actions have resulted in a situation where the true wishes of employees are not likely to be ascertained in a representation vote and that therefore it should be certified pursuant to section 7a. If the applicant is correct in this regard, then this is not a case of irregularities which can be corrected merely by conducting a second vote. Further we are of the view that even if the applicant had raised its allegations concerning the affect on employees of the respondent's actions at an earlier date it is highly doubtful that the Board would have been in a position to take any corrective action prior to the actual taking of the vote.

4. It is apparent from the evidence that many of the employees in the bargaining unit are fairly recent immigrants to Canada who possess only minimal knowledge of the English language. During the course of the hearing counsel for the applicant called as a witness Mr. Franco Savoia. Mr. Savoia, who is a native of Italy, holds degrees in psychology and theology and has for some nine years been involved in the formation and operation of various programs aimed at providing assistance to ethnic communities in the Toronto area. Mr. Savoia is currently the regional director of the Young Men's Christian Association in West Toronto. It was the contention of the applicant's counsel that Mr. Savoia should be allowed to testify as an expert witness so as to permit him to give his opinion as to how immigrants might be affected by certain pieces of literature distributed by the respondent prior to the taking of the representation vote. The Board, however, declined to allow Mr. Savoia to give opinion evidence in this regard on the grounds that the subject matter was not a proper one for expert testimony. It was the Board's ruling that although the Board itself might be required to draw certain conclusions as to how employees in the bargaining unit would likely be affected by the respondent's pre-vote propaganda, those conclusions would be based only upon the objective evidence before it and upon the Board's own experience in such matters. (In this regard see *Adam v. Campbell*, [1950] DLR 449 wherein Cartwright J. in delivering the majority judgment of the Supreme Court of Canada adopted (at page 458) a statement from the 8th edition of "Phipson on Evidence" to the effect that neither experts nor ordinary witnesses may give their opinion on the manner in which persons would probably act or be influenced.)

5. Related to the question of the admissibility of expert testimony concerning the possible influence of the respondent's pre-vote propaganda on immigrant employees was the applicant's strongly argued contention that in determining whether or not the respondent used undue influence contrary to section 56 of the Act, and as to whether or not the applicant should be certified pursuant to section 7a, the Board should take into account the fact that many of the bargaining unit's employees are immigrants to Canada. It was counsel's contention that such persons were more likely to have been influenced by the



respondent's propaganda than would non-immigrant employees. This is a proposition with which we are unable to agree. The Board is called upon with ever increasing frequency to concern itself with bargaining units comprised to a greater or lesser extent of fairly recent immigrants to Canada and it is not uncommon to have such persons testify for one reason or another before the Board. Our experience in this regard has taught us that employees who are immigrants are not, only because they are immigrants, somehow more easily influenced or more incapable of making their own decisions than are other employees. Some individuals appear to be possessed of greater fortitude than do others. Similarly there are some individuals who by their very nature may be easily influenced and who tend to perceive threats in circumstances where most others would not. However, these are reactions which appear to be based on individual temperament and character rather than on any general characteristics of language or former country of residence. This being the case we are of the view that no inferences can be drawn as to the possible susceptibility to influence of employees in the bargaining unit on the grounds only that many of them are immigrants from abroad.

6. During the course of the hearing the representative of the group of objectors sought to introduce into evidence a petition signed by some 129 employees in the bargaining unit. The petition reads as follows:

“We the undersigned state that the union vote on January 25, 1977 was a democratic election. We were not forced to vote one way or the other. Furthermore, although some of us are immigrants we understand the issues fully. The choice to vote against the union was made freely.”

The Board declined to accept the petition on the grounds that it was not likely to be of any probative value. We are of the view that an inquiry into a claim that undue influence has been brought to bear on employees such that their true wishes are not likely to be ascertained from the results of a representation vote requires not an assessment of the subjective views of employees, but rather an assessment of the objective facts concerning the events preceding the taking of the representation vote. On the basis of its own assessment of these facts the Board then is required to determine whether or not employees were likely to have been unduly influenced.

7. The respondent has an established practice by which managerial personnel meet with groups of 15 to 20 employees at a time every 4 to 6 weeks. These meetings are referred to as “communication meetings.” At these meetings a broad range of topics including working conditions and employee benefits are discussed in some detail. The initial part of these meetings invariably follow a formal agenda prepared by management, although the latter part of the meetings become more informal and employees are entitled, and indeed encouraged, to raise and discuss any further issues of concern to them. Mr. Leverenz, the manager of the respondent's distribution centre, testified that attendance by employees at the early stages of such meetings is obligatory, although employees are free to leave once the meetings enter their more informal discussion stage.

8. The representation vote was held on January 25, 1977 and the quiet period commenced at midnight on January 21st. On January 20th and 21st the respondent held a series of communication meetings for employees in the bargaining unit at which Mr. Leverenz and Miss C. Nash, the respondent's personnel manager, were both in attendance. A number

of topics were covered at the meetings, including such items as employee lockers and first aid supplies. Miss Nash also commented at length on the upcoming representation vote. She explained in detail the arrangements which had been made for the vote as well as the procedures by which the vote would be conducted. She also cautioned employees against writing their names or any other identifying marks on the ballots. This part of Miss Nash's presentation was entirely factual and straight forward. However, Miss Nash during the meetings also held up a sample ballot and put an "X" beside the word "no". While there is some discrepancy in the evidence as to what she stated at the time she did so, we are of the opinion she said "if you choose to vote no you mark one "X" and one "X" only like this."

9. Counsel for the applicant led evidence in an attempt to establish that during one of the communication meetings Mr. Leverenz had threatened that if the applicant were certified the respondent would discontinue a 25 per cent employee discount on certain clothing items as well as a free bus service connecting the respondent's premises with the Toronto subway system. We are of the view, however, that Mr. Leverenz made no such threats. Instead we accept completely Mr. Leverenz's testimony that in one of the meetings he was asked by an employee if management could give the employees what they were looking for, and that he replied that the respondent could not make any such promises, but that neither was the union making any such promises as indicated by the fact that at a previous meeting an active union supporter in response to a specific question from another employee had stated that the union could not guarantee a continuation of the free bus service. Mr. Leverenz's testimony also reveals that during the more informal part of at least two of the communication meetings employees openly discussed the pros and cons of being represented by a trade union. It is clear that no attempt was made to silence supporters of the union, and at least two employees left the meeting when this discussion began without any attempt being made to stop them.

10. During the week preceding the taking of the representation vote the respondent caused to have some 21 posters placed about its premises. Eight of these posters were approximately 4 by 6 feet in size and were hung from the ceiling. The remaining 13 posters were smaller in size, measuring approximately 1½ x 2 ft. and these were posted about the premises. Each of the posters contained the message "Keep the Union Out" as well as a copy of a representation vote ballot with an "X" marked beside the "No."

11. The respondent also placed 2 showcases in its premises. One showcase contained a number of grocery items and over it were signs in English, Portuguese and Italian stating "No union \$96 buys you this." The other showcase was empty. Over it were signs stating "\$96 union dues buys you nothing." (Presumably this relates to a statement contained in a letter from the respondent to employees dated January 11, 1977 wherein it states: "At the present time you do not have to pay any dues in order to work at Dylex. A Union would require you to pay Union dues whether you wanted to belong to the Union or not. This Union charges employees at Dylex at Lakeshore, Union dues of not less than \$8.00 per month. Why should you pay the Union \$96.00 per year in order to be able to work at Dylex.")

12. As noted above, the respondent also put out certain pre-representation vote propaganda. This propaganda took the form of three letters dated January 11, 14 and 18, 1977. Copies of these letters were handed out to employees at work and also mailed to employees' homes. Some of the mailed copies were in the Italian and Portuguese languages.

13. All three letters put out by the respondent indicate very clearly that the respondent opposed having its employees represented by the applicant. Each of the letters urges employees to vote "No" in the representation vote and each letter concludes with an illustration of the ballot to be used in the vote with an "X" marked beside the word "No". Although the letters cover a broad range of topics the two issues primarily relied on by the applicant concern the questions of job security and a possible future strike.

14. The letter of January 11, 1977 refers directly to job security in the following terms:

"The Union supporters will tell you that the Union will provide you with 'job security.' This is false. At National Knitting (which is earlier referred to in the letter as "another Dylex company") there were 300 employees before the strike and after the strike 170 employees.

What did the Union do for the employees who lost their jobs?

No Union has ever provided job security for employees of a company. Attached to this letter are clippings from newspapers in 1976 showing that the Unions were not able to save the jobs of employees at two companies that closed down their operations, i.e. Miami Carey Company Limited, and Domtar, one of the largest companies in Canada. Ask Al Leibovich if the Union was able to save the jobs of employees when Simon Cigar Co. Ltd. closed the plant where Al worked a few years ago."

Attached to this letter were copies of several newspaper clippings which refer to announcements that the Domtar fine papers plant in Georgetown would be closing effective February 25, 1977 and that effective January 9, 1977 Miami Carey Ltd. would be moving its operations from Metropolitan Toronto to Barrie. The headlines of the articles referring to the Domtar closing are "DOMTAR TO CLOSE MILL, 176 WORKERS LOSE JOBS"; "DOMTAR CLOSING ITS PAPER MILL IN GEORGETOWN" and "DECISION FINAL: PLANT TO CLOSE IN GEORGETOWN." The articles relating to Miami Carey Ltd. are headed: "ETOBICOKE FIRM MOVING TO BUST UNION - STEWARD" and "WEEPING WORKERS AT FAREWELL PARTY."

15. The letters of January 14 and January 18 make reference to job security as follows:

#### **January 14**

16. **Question** Can the Union provide me with job security?

**Answer** No. No union can provide you with job security. You can only achieve job security if we work together in harmony to keep this operation sound.

17. **Question** Can the Union have me fired from my job?



**Answer** YES. If there is a Union shop at Dylex and if the Union expels you from membership, we would be forced to terminate your employment.

## January 18

### 2. Job Security

A lot has been said about job security during the Union campaign. However, we have in our previous letters shown you that there is no way in which the union can provide you with job security. We take the position that we have provided you with job security.

We employ in our warehousing and distribution operation almost 200 people. Most of you have received continual employment during your period of employment.

In the retail industry there are certain slow periods when it is necessary to lay-off. You let us know that you were not happy with the way in which we were laying off, and we therefore changed the way in which we lay-off, so that we recognize the principle of departmental seniority. You also know that we hold off laying off as long as possible and we recall our employees as soon as possible.

The full-time employees also let us know that they were concerned with the fact that part-timers were working when full-timers were laid off. We have corrected that problem so that we no longer allow part-time employees to work while there are full-time employees on lay-off who are willing to come in and do the work.

*It is easy to talk about providing job security, but the fact is that it is you and this Company working together that provide your job security. The Union will never be able to do that.*

(Emphasis in the original.)

16. The respondent's three letters comment on the possibility of a strike, including the negotiations prior to such a strike and the consequences which might flow from such a strike, in the following terms:

## January 11

1. The Union will not be able to get you a wage increase for the next year as we have already given a wage increase at least as high as the maximum permitted by the A.I.B. (Anti-Inflation Board.)

The Union supporters like to make big promises about how much of an increase the Union will get you. Let us look at how well this Union did in 1976 for the employees of another Dylex company, National Knitting Company Limited. The employees of National Knitting Company, after a four week strike, received a settlement of 10% or 35 cents in the first year, whichever is greater, and 6% in the second year. They were offered 10% in the first year and 8% in the second year *before* the strike. At National Knitting Company Limited the Union employees receive the following wages:

Helpers, General Hand, order filler, boxer \$3.05

Plant Cleaner 3.35

Receiver 3.55

Packer 3.70

Stockkeeper 4.13

How does this compare with your wages?

2. The Union supporters may demonstrate and the Union supporters may make big promises, but they probably will *not* tell you that the Company does not have to agree to anything that it does not want to agree to. When a Company does not agree to what the Union wants there is often a *strike*. Can you afford to lose your wages for several weeks or months while a strike takes place? There was recently a six month strike at the Kresge Distribution Centre. After six months of strike, the Union walked away, and there is now no Union at the Kresge Distribution Centre. So it is easy for Union Supporters to make promises, *but they can't promise to deliver*.

**January 14, 1977**

8. **Question** Can we try the Union for a few months and then if we don't like it, can we get rid of the Union?

**Answer** NO. Union supporters may tell you to try the Union for a few months and then if you don't like it you can get rid of it, however, this is much easier said than done, and while some unions are decertified it cannot be done until after a year, and in most cases it does not happen at all. When it does happen it usually comes after a long and bitter strike.

9. **Question** If there is a strike, do I have to walk on the picket line?

**Answer** YES. Most Unions require employees to walk on the picket line in order to qualify for strike pay of approximately \$30 per week. Employees who do not walk on the picket line do not get strike pay. Do you want to picket outside for several months in the cold, the snow and the rain?

10. **Question** If the Union gets in, will there be a strike?

**Answer** If the Company and the Union cannot agree on the terms of a contract then there is a very strong possibility that there would be a strike. Strikes often last many months and create great hardship. Can you afford to be without a job for three or four or five or six months?

18. **Question** If the Union gets in, does this mean that the Company will have to give the employees what the Union promises?

**Answer** NO. The Company is only required to bargain in good faith with the Union. The Company is *not* required to agree to anything.

19. **Question** Can we collect Unemployment Insurance while we are out on strike?

**Answer** NO.

20. **Question** Can I lose my job if the Union takes me out on strike?

**Answer** YES. Under Ontario law, in order to save his job an employee must offer to return to work within the first six months of a strike. After a strike has lasted six months no employee has any right to his job.

21. **Question** If I go out on strike can the Company hire other people to do my job?

**Answer** YES.

22. **Question** If the Union takes me out on strike, will I get more money?

**Answer** NO. Not necessarily. In my last letter I pointed out to you how the employees at National Knitting Company got less money after a strike than they were offered before the strike.



23. **Question** Can the Union boys guarantee me a job and the benefits we now enjoy, or is it possible for us to lose something we now have?

**Answer** The Union supporters may tell you you have everything to gain and nothing to lose. They would like you to believe they can do wonders for you. But the truth of the matter is – *the Union can't guarantee you anything. They can't even guarantee that in a contract you will get the same benefits you now have.* Whether you would still have the benefits you now enjoy if the contract is negotiated would depend entirely on what takes place in negotiations. Please remember three important facts:

1. A Union can't give you anything.
2. A Union can't guarantee you anything. It can only ask us.
3. A Union can only promise – a promise is worth just what it costs – nothing.

Please remember:

- the Union cannot guarantee your paid vacations
- the Union cannot guarantee your paid holidays
- the Union cannot guarantee your wages
- the Union cannot guarantee your group insurance plan
- the Union cannot guarantee your sick leave
- the Union cannot guarantee your paid breaks
- the Union cannot guarantee your paid transportation to work
- the Union cannot guarantee your pay cheque
- the Union cannot guarantee you steady work and job security
- the Union cannot guarantee you more money
- *the Union cannot guarantee you anything.*

(Emphasis in the original.)

17. Having outlined the facts applicable to the applicant's request that it be certified pursuant to section 7a, we turn now to consider section 7a itself. The section reads as follows:

7a. Where an employer or employer's organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employer's organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

It is clear from the wording of the section that three separate requirements must be met before this section can be applied, namely:

- 1) an employer has contravened the Act,
- 2) the contravention has resulted in a situation where the true wishes of the employees are not likely to be ascertained, and
- 3) a trade union has membership support adequate for the purposes of collective bargaining.

With respect to the third requirement as set out above, namely, that a trade union have membership support adequate for the purposes of collective bargaining, counsel for the respondent agreed with the counsel for the applicant that such a requirement had originally been met in this case. Counsel for the applicant was not contradicted when he stated that the applicant had originally filed evidence of membership on behalf of slightly over 50 per cent of the employees in the bargaining unit.

18. With respect to the requirement that an employer must have violated the Act, the applicant in this case alleged that the respondent had violated section 56. Section 56 reads as follows:

56. No employer or employer's organization and no person acting on behalf of an employer or an employer's organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

19. Counsel for the applicant took the position that an employer was required to stay neutral during the course of a union organizing campaign. We are of the view that no such requirement exists. Section 56 expressly states that nothing in the section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, threats, promises or undue influence. Where the difficulty inherently arises, however, is in trying to define the line at which an expression of views by an employer becomes "coercion, threats, promises or undue influence." In seeking to establish where the line lies the Board starts with the presumption that employees recognize that employers generally are not in

favour of having to deal with employees through a trade union, and that therefore it ought not to surprise them when their employer indicates that he would prefer it if they voted against a trade union. Following from this the Board takes the view that an invitation to employees from their employer to vote against a trade union, in the absence of any surrounding facts or circumstances which would cause the employees to place undue emphasis on such statements, does not constitute undue influence within the meaning of section 56. (See: *Playtex Limited*, [1972] OLRB Rep. Dec. 1027.) On the other hand, however, the Board is also cognizant that an employee may be peculiarly vulnerable to employer influences. This point is clearly brought out in the decision of the Canada Labour Relations Board in the *Taggart Service Limited* case [(1964) CLLR Transfer Binder '64 - '66, ¶16,015 at page 13,055] the following excerpt from which was cited with approval by this Board in the leading case of *Bell & Howell Ltd.*, [1968] OLRB Rep. Oct. 695 at p. 706:

An employer may express his views and give facts in appropriate manner and circumstances on the issues involved in representation proceedings in so far as these directly affect him and has the right to make appropriate reply to propaganda directed against him in relation thereto. However, he should bear in mind in so doing the force and weight which such expressions of views may have upon the minds of his employees and which derive from the nature and extent of his authority as employer over his employees with respect to their wages, working conditions and continuity of employment. He should take care that such expressions of views do not constitute and may not be reasonably construed by his employees to be an attempt by means of intimidation, threats, or other means of coercion to interfere with their freedom to join a trade union of their choice or to otherwise select a bargaining agent of their own choice.

20. Counsel for the respondent took the position that the material set out in the three letters to employees was factual and that it did not constitute a form of undue influence. It may well be that each of the statements contained in the letters if taken by itself is factual. However, we nevertheless are of the view that the letters when taken together in their entirety go well beyond a mere expression of employer views but instead deliberately seek to capitalize on normal employee desires for job security and fears of loss of employment.

21. No union can guarantee any employee indefinite job security. However, the respondent in its letters rather than merely stating this simple fact has instead set out in rather vivid fashion instances of entire plants being closed despite the presence of a trade union. Coupled with this the respondent has also set forth its views as to how its employees can best achieve job security. In its letter of January 14 the respondent stated: "No union can provide you with job security. You can only achieve job security if we work together in harmony to keep this operation sound." This advice is repeated in the letter of January 18, 1977 wherein it states: "A lot has been said about job security during the Union campaign. However, we have in our previous letters shown you that there is no way in which the Union can provide you with job security. We take the position that we have provided you with job security... It is easy to talk about providing job security, but the fact is that it is you and this Company working together that provide job security. The Union will never be able to do that." The implication from this seems to be that while the applicant cannot provide employees with job security the respondent can, provided that employees work together "in



harmony” with the respondent. This working together in harmony, however, appears only to be possible in the absence of a union. Indeed in the concluding paragraph of the third and final letter is to be found the following message:

“We at Dylex believe that we can achieve prosperity, harmony and happiness by working together among ourselves without the interference of a Union or any other third party. I therefore urge you on Tuesday to show that you are happy to be working here and that we are doing a good job for each other. Remember mark “X” beside “NO” on your ballot.”

22. Not unrelated to the above references in the letters to a lack of job security are the references to any possible negotiations. The point is made that the union during negotiations may not even be able to retain for employees the benefits they currently enjoy. Reference is also made to the fact that negotiations (in which “the company is *not* required to agree to anything”) may well lead to a lengthy strike. Coupled with this is a not so veiled threat of a possible loss of employment during the course of such a strike.

23. As indicated earlier we are of the view that the respondent’s letters were deliberately calculated to play upon employee fears for their job security. Added to this are the anti-union visual displays in the respondent’s premises which were in constant view of the employees at all times, as well as the references in the communication meetings to the applicant and the instructions as to how to vote “NO.” Taken altogether we feel that these actions of the respondent constituted undue influence within the meaning of section 56 of the Act.

24. Not every contravention of the Act will necessarily call for the application of section 7a. As noted above the Board must be satisfied that the contravention has resulted in a situation where the true wishes of employees are not likely to be ascertained. In this case, however, we are of the view that the respondent’s actions were of such a nature that they were likely to affect the ability of employees to express their true wishes in the representation vote. Further, having regard to both the number of employees who signed applications for membership in the applicant union as well as to our conclusion that the actions of the respondent prior to the taking of the vote were likely to affect the ability of employees to express their true wishes in the vote, we are of the opinion that the applicant has membership support adequate for the purposes of collective bargaining. This being the case the applicant has demonstrated its right to be certified pursuant to section 7a.

25. It is worth noting at this point that we do not regard the certification of a union pursuant to section 7a to be a form of “punishment” against an employer. Its purpose is instead to insure that an employer does not benefit from its own wrongdoings. In the instant case the applicant appears to have had a reasonable prospect of being selected by a majority of employees in a representation vote. The actions of the respondent, however, were such as to ensure that this could not occur. Certification of the applicant pursuant to section 7a is but an attempt to put the parties in the same position they would have been in had the respondent not engaged in conduct prohibited by section 56 of the Act.

26. In its decision of January 6, 1977 the Board found a bargaining unit consisting of all employees of the respondent in its Central Distribution and Warehousing Division of

Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, group supervisor, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week to constitute a unit of employees of the respondent appropriate for collective bargaining. Having regard to the above determinations, a certificate will now issue to the applicant with respect to this bargaining unit.

#### DECISION OF BOARD MEMBER H.J.F. ADE

1. I regret that I must dissent from the Decision of the Majority of the Board. There are several grounds upon which I dissent.

2. The acts of the respondent which are complained of by the applicant all took place more than three days before the date of the vote. The applicant, however, did not make any complaint with respect to these matters until after the vote when the applicant saw that it had been unsuccessful. As the Board stated in the *Chateau Gardens* case, "The Board is confident that our rules were not designed to allow a party in these circumstances to have two bites of the cherry where one may have sufficed." I agree with the statement in the *Chateau Gardens* case and I am of the opinion that it is equally applicable to this case, and that the applicant has been given "two bites of the cherry." I am not able to accept the distinction made by the majority of this Board and, with respect, I feel that the majority has rationalized a distinction without a real difference.

3. I believe the majority has exercised their discretion improperly for a number of reasons:

- (i) Firstly, although it was agreed by Counsel for the respondent that at the time of the Application for Certification the applicant had membership support adequate for the purposes of collective bargaining, *he did not say that at the time of and subsequent to the vote the applicant had such membership support.* I am of the opinion that the evidence clearly establishes that at the time of the vote the applicant did not have the required support.
- (ii) The majority has assumed, incorrectly in my respectful opinion, that this is not a case which can be corrected by the holding of a second vote. If the respondent had contravened S. 56, and I am of the opinion that it did not, it would most certainly have been more appropriate to hold a second vote rather than certify the Union outright as the majority have done. The holding of a second vote in such circumstances would have been more consistent with Board practice in these matters. Outright certification has usually only followed the most blatant acts of intimidation, usually accompanied by improper discharges of Union supporters.

By disregarding the vote of the overwhelming number of employees who cast ballots against the Union (145 against, 25 for) the majority is forcing a collective bargaining situation in which there may be great reluctance by the employer and the employees to ac-

cept the fact that the Union is truly the representative of the employees. This can lead to the kind of chaos in bargaining, with charges and countercharges and the ultimate decertification of the Union as happened in the *DeVillbiss* and the *Wolverine Tube* cases.

- (iii) I am strongly of the opinion that the respondent's conduct and propaganda material did not constitute a violation of S. 56 of the Act. While the respondent's position was stated with some force, it was a factual and correct statement of the law and of events which had recently taken place and which received wide publicity in the news media. S. 56 clearly confers upon the employer the right to state his views. This the employer has done and in my opinion has done without in any way committing the mischief prohibited by S. 56.

The Board's decision has the effect of negating the right of employer free speech conferred by the legislature of this Province.

4. There is another matter which causes me some concern. At the hearing a number of employees appeared with Counsel and with a petition purportedly signed by 129 employees in the bargaining unit of 175. The text of the petition is contained in para. 6 of the majority decision. I feel the Board erred in not permitting these employees to be heard. I think it is dangerous for this Board to take a position that they are not prepared to hear how the employees themselves feel but take unto themselves the job of applying their own subjective conclusions with the mistaken belief that they are making an objective determination. I can think of no group who had greater right to be heard than the employees themselves.

5. In conclusion, may I state that I am greatly disturbed by the Decision of the majority and concerned with the potential consequences of this Decision.

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**2023-76-R** International Molders & Allied Workers Union, (Applicant), v. Ex-Cell-O Wildex, Canada, Division of Ex-Cell-O Corporation of Canada Limited, (Respondent), v. Group of Employees, (Objectors).

**Certification – Section 79 – Whether employer unfair practice justifies certification without vote pursuant to Section 7a.**

**BEFORE:** A. L. Haladner, Vice-Chairman, and Board Members F. W. Murray and O. Hodges.

**APPEARANCES:** *Edward C. Witthames, Gordon Plancke and Jeffrey Egner for the applicant; R. A. Werry and L. Daw for the respondent; Marlene Zwaan and Philip J. Malcolm for the objectors.*



**DECISION OF A. L. HALADNER VICE CHAIRMAN AND BOARD MEMBER O. HODGES: June 30, 1977.**

1. The name: "Wil-Dex Unit of Ex-Cell-O Corporation of Canada Limited" appearing in the style of cause of this application as the name of the respondent is amended to read: "Ex-Cell-O Wildex, Canada, Division of Ex-Cell-O Corporation of Canada Limited".

2. This is an application for certification in which the applicant has requested that it be certified without a vote pursuant to section 7a of The Labour Relations Act.

3. The applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

4. Having regard to the agreement of the parties, the Board finds that all office, clerical and technical employees of the respondent at Clinton, Ontario save and except manager, persons above the rank of manager, sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The Board further finds that there were six employees in the bargaining unit at the time the application for certification was made. The applicant's evidence of membership indicates that three of these employees were members of the applicant on March 15, 1977, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of The Labour Relations Act to be the time for the purpose of ascertaining members under section 7(1) of the Act.

6. A statement of desire in opposition to the application was filed in this case. The only effect that such a statement can have is to cause the Board to exercise its discretion to order a representation vote in a case where outright certification might otherwise be granted pursuant to section 7(3). Because the applicant's initial membership position is below the percentage level required for outright certification under section 7(3) (and because the issuance of a certificate pursuant to section 7a requires a finding that a representation vote would be unlikely to disclose the true wishes of the employees) the statement of desire is of no relevance and has not been inquired into by the Board.

7. The applicant commenced a campaign to organize the employees of the respondent in late February of 1977. On Monday, March 7, the applicant filed two separate applications for certification: the first, in respect of the employees in the plant; and the second, in respect of the employees in the office. We are concerned here with the second application.

8. On the same Monday, March 7, the employees in both the plant and the office were required to attend a meeting in the respondent's cafeteria. At that meeting, a letter purportedly written by the general manager of the respondent was read to the employees by Pat Newington, the respondent's manufacturing manager. This letter was not produced at the hearing. However, the uncontradicted evidence of the witnesses who testified for the applicant was that the letter, as read, outlined the disadvantages of having a union, and as well, contained statements to the effect that certain employment privileges might be withdrawn if the union got in.

9. Following the recitation of the general manager's letter, the employees in attendance at the meeting were told by Newington that if any of them wanted to talk about it or had any second thoughts, they were to feel free to come in and see him in his office.

10. Shortly after the meeting in the cafeteria, the employees in the office were approached at their desks by the office manager, Larry Daw, who inquired as to whether they had been in contact with the union and had signed cards. One of those employees, Joy Cleave, gave evidence, which was neither challenged on cross-examination nor contradicted by the evidence of the respondent, that she was called into Mr. Daw's office the next day, Tuesday, March 8, and again asked whether she had signed a card. Her evidence was that she originally denied having signed a card, but finally admitted to this after Daw stated he knew she was lying but would give her a second chance.

11. A non-bargaining unit employee, J. Carter, was also called into Daw's office on Tuesday, March 8, and subjected to the same form of intimidation.

12. The interrogation of persons by management regarding their union membership appears to have been confined to the office. While there was evidence at the hearing that some of the employees in the plant had been approached by management after the March 7 meeting and asked questions of a general nature regarding the union, there was no evidence that any of these employees had been questioned about their personal affiliation or in any other way interrogated.

13. The applicant contends that the respondent's interference in its organizing campaign was such that a representation vote would not show the true wishes of the employees. It has asked that the Board certify it, without a vote, pursuant to section 7a of The Labour Relations Act.

14. Certification without a vote under section 7a was designed as both a deterrent to illegal employer interference in union organizational campaigns, and as a device to provide a meaningful and effective remedy in those cases where the employer's interference operated to destroy the free selection process guaranteed by section 3 of the Act. Prior to the 1975 amendments to the Act, a union seeking to have section 7(4), the predecessor to section 7a, invoked was required to have filed membership evidence on behalf of at least fifty per cent of the employees in the bargaining unit. In recognition of the fact that employer interference often occurs early in an applicant's organizing campaign, and before a majority has been obtained, the fifty per cent membership requirement was removed by the 1975 amendments.

15. Section 7a provides as follows:

"Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit."

16. As the Board pointed out in *Winson Construction Limited*, [1976] OLRB Rep. Nov. 714, the effect of applying section 7a is to take an application out of the normal certification process. Ordinarily, a union, in order to obtain automatic or outright certification under The Labour Relations Act, must exhibit unqualified support from at least fifty-five per cent of the employees in the appropriate bargaining unit. The fifty-five per cent requirement reflects the belief that there must be some margin for error; and that, therefore, something more than a simple majority is necessary to ensure that the bargaining agent has a true mandate. Where, as here, an applicant union does not obtain the membership percentage required to qualify for outright certification, but enjoys the support of at least forty-five per cent of the bargaining unit employees, the Board will normally order a representation vote. In order to be certified after a vote, an applicant must obtain at least fifty per cent of the votes cast.

17. Section 7a allows the Board to certify a trade union as bargaining agent without the membership percentage usually required for outright certification. It is not surprising, then, that the Legislature has placed a number of legal restrictions on its use. As the wording of the section makes clear, it is not enough that the employer has engaged in conduct prohibited by The Labour Relations Act. This conduct must have resulted in a situation where the true wishes of the employees are not likely to be ascertained from the results of a representation vote. As well, the trade union must, in the opinion of the Board, have membership support adequate for the purposes of collective bargaining in the union found appropriate by the Board.

18. The logic of these requirements is clear enough. The premise of the Act's certification procedures is that collective bargaining is to be afforded only when it is the choice of the majority. Accordingly, the grant of automatic certification to a trade union, in the absence of documented evidence of majority support, should only be permitted where the true wishes of the employees are not likely to be ascertained through the normal procedures and where the union has sufficient support among the employees in the unit to bargain collectively with the employer.

19. The Board has indicated, quite clearly, that certification without a vote under section 7a is not an automatic response to every unfair labour practice which occurs in the pre-certification period, and that an applicant must establish substantial employer interference in the certification process to secure a determination that "the true wishes of the employees – are not likely to be ascertained". (See, for example, *Robin Hood Multifoods Limited*, [1976] OLRB Rep. May 250.) In this regard, a distinction has been drawn between the criteria used to determine whether a statement of desire (or petition) in opposition to an application for certification reflects the true wishes of the employees who signed it and the criteria used to determine whether the true wishes of the employees are not likely to be ascertained from the results of a representation vote, which is conducted under the supervision of the Board, and by secret ballot. As the Board stated in *Smith Beverages Limited*, [1975] OLRB Rep. Dec. 956, if an employee logically suspects that his employer will become aware of his signing or his refusal to sign a petition, this can effectively thwart his free expression as represented by his signature. For this reason, very little in the way of employer interference, in the surrounding circumstances, need be shown for the Board to conclude that a petition does not represent a true change of mind by the employees who signed it such that it should cause the Board to exercise its discretion to order a vote. The situation is quite different on a representation vote, however, where the employees can usually rest assured that their choice



will not be revealed to their employer; and therefore, the Board requires evidence of intimidation or coercion such that the secrecy of the ballot cannot be relied upon to ensure a free expression of employee views.

20. In *Winson* (supra), the Board offered this example of the kind of intimidatory or coercive activity on the part of an employer which would, by its very nature, be likely to conceal the true wishes of an employee on a secret ballot:

“No general rules can be set down as to what circumstances might justify a conclusion that employee desires are not likely to be ascertained in a representation vote. Rather, each case must be decided on its own particular facts. In some instances the actions of an employer may be such that a determination that a vote would not be reflective of employee desires may be very easily arrived at. For example, a warning to employees that the certification of a trade union would result in lay-offs and shorter working hours would, lacking any other considerations, tend to have such an intimidating effect that employees might reasonably be expected to refrain from voting for the union no matter what their true feelings about being represented by it ... In such a situation to vote in favour of being represented by the trade union might well appear to employees to be tantamount to voting themselves either out of a job or, at best, a drop in pay.”

21. Turning now to the situation at hand, before the Board can exercise its discretion under section 7a and certify the applicant without a representation vote there are three conditions which must be met. First, the respondent must have contravened the Act. Second, this contravention must have resulted in a situation where the true wishes of the employees are not likely to be ascertained. Third, the applicant must have membership support adequate for the purposes of collective bargaining in the bargaining unit found appropriate by the Board.

22. There can be no doubt that the first condition to the exercise by the Board of its discretion under section 7a – a contravention of the Act by the employer – has been satisfied. When management holds a meeting of employees in the midst of a union organizing campaign, in circumstances amounting to a “captive audience”, at which it suggests, by way of a letter purportedly written by the non-attending general manager, that certain employment privileges might be withdrawn in the event the union is successful; and then invites employees having “second thoughts” to meet privately with it; and then interrogates persons individually, in the confines of its office, as to their membership in the union, it can hardly be contended that the employer has not contravened the Act. Indeed, counsel appeared to have conceded as much, for he made no argument on this issue.

23. The conduct of the respondent in this case constitutes substantial interference with the right of the applicant to organize employees for purposes of collective bargaining and with the right of employees to select or reject a trade union as bargaining agent. As such, it amounts to a clear violation of section 56 of The Labour Relations Act which prohibits, among other things, employer interference with the selection of a trade union. The respondent’s conduct also amounts, in our view, to a violation of section 58(c) and section 61 of the Act, both of which prohibit the intentional use of intimidation or coercion by an

employer to compel an employee to refrain from becoming or to cease to be a member of a trade union.

24. The answer to the question of whether the respondent's conduct in contravention of The Labour Relations Act has made the ascertainment of the true wishes of the employees unlikely is perhaps less obvious. The Board has come to the conclusion, however, that this second condition to the exercise of our discretion under section 7a has been more than amply satisfied.

25. The kind of illegal interference engaged in by the employer in this case is the very kind of interference which is inherently likely to influence an employee's ability to vote in accordance with his own free wishes. Although the employer here has not, in contrast to the employer in the hypothetical situation described by the Board in *Winson*, threatened its employees with lay-offs or shorter working hours, when the actions of this employer are viewed in their entirety, there can be little doubt that they contained, and were intended to contain, an implicit threat to the employees' job security. It is equally clear, moreover, that the employer's actions in contravention of the Act have caused employees to believe that by supporting or continuing to support the union, they could be placing their jobs in jeopardy. How else is one to explain Cleave's initial denial of her union membership and her subsequent admission after being told by her manager that she would be given a "second chance".

26. The Board has also been cognizant of the fact that we are dealing here with a small unit of employees who are likely to be particularly vulnerable to employer pressure. In this regard, it bears repeating that the most blatant instance of employer coercion and intimidation – namely the interrogation of persons as to their union membership – seems to have been restricted to the office.

27. Another feature of this case which has led the Board to conclude that a representation vote would be unlikely to disclose the true wishes of the employees relates also to the size of the bargaining unit. As stated earlier, the secrecy of the ballot can, in the majority of cases, be counted on to safeguard the right of the bargaining unit employees to vote in accordance with their own free wishes. In a unit the size of this one, however, the employees may well have cause to fear that a vote in favour of the union would be subject to identification by their employer. This is particularly true where, as here, the employer has already displayed an apparent knowledge of which employees have signed cards. It must always be remembered that while the ballots in a representation vote are secret, the results of the vote are not.

28. To sum up our conclusion of this question of the likelihood of ascertaining the true wishes of the employees on a representation vote, the Board has determined that the nature and extent of the respondent's interference in the applicant's organizing campaign was such, especially in view of the size of the bargaining unit, that a representation vote would be unlikely to disclose the true wishes of the employees who voted.

29. The final condition which must exist before the Board may certify a trade union without a vote under section 7a is that the union have membership support adequate for the purposes of collective bargaining. In this case, the applicant had, as of the date of its application for certification, the documented support of at least half the employees in the

bargaining unit found by the Board to be appropriate for collective bargaining. This is obviously "support adequate for the purposes of collective bargaining", and we so find.

30. The Board considers this an appropriate case to exercise its discretion and grant the applicant's request for certification pursuant to section 7a of the Act.

31. A certificate will issue to the applicant.

#### **DECISION OF BOARD MEMBER F. W. MURRAY:**

1. While I agree with the majority in paragraph 23 wherein it found that the respondent had violated sections 56, 58(c) and 61 of the Act, I am not persuaded that the violations were of such a nature and extent as to result in a situation where the true wishes of the employees are not likely to be ascertained.

2. Accordingly, I would have directed a representation vote.

**0288-77-U Fabricated Steel Products (Windsor) Limited, Applicant), v. Gerard A LaBelle, Ernest G. Fryer, Albert Colombe et al (See Schedule "A" attached), (Respondent).**

**Strike – Whether availability of alternative remedies a bar to cease and desist direction.**

**BEFORE:** E. Norris Davis, Vice-Chairman, and Board Members O. Hodges and F. W. Murray.

**APPEARANCES:** *Leonard P. Kavanaugh, Charles F. Clark and Douglas R. Hewitt for the applicant; B. Chercover, John Moynahan, J. Hogan and K. Maheux for the respondent.*

**DECISION OF THE BOARD:** June 17, 1977.

1. The applicant seeks a declaration of unlawful strike against the named individual respondents under section 82 of The Labour Relations Act.

2. Counsel for the respondents argues that there is, here, a multiplicity of remedies available to the applicant and being pursued which of themselves would serve any labour relations purpose which might otherwise be served by a Board declaration. Counsel further argues that in other remedial sections of the legislation, the Board will defer to existing grievance arbitration where such exists, and that the Board should not be widening access to section 82. In furtherance of these arguments the respondents' position is that this is a case in which the Board should refuse to issue a declaration, even if it were to conclude that an unlawful strike had occurred. The Board believes these matters should be dealt with first.

3. There is currently in effect a collective agreement covering the employees herein involved. The agreement is between the applicant and Local 195, U.A.W. and became effec-



tive on January 1, 1977, with an expiry date of December 31, 1979, and is a renewal of a preceding collective agreement. The agreement contains an arbitration clause and a "No Strike – No Lockout" clause. The union was not joined as a party to this proceeding.

4. At the hearing before the Board on May 20, 1977, counsel informed us that a temporary injunction had been issued on May 16th enjoining picketing and that the parties were being heard by the Court on May 20th regarding continuance of the injunction. On June 2nd at the continuation of the Board hearing, counsel again informed us that the injunction had been extended to June 7, 1977, at which time the Court would issue its decision as to its further continuance and reasons. The injunction proceedings arise out of an action claiming civil damages against 55 employees of the applicant.

5. The applicant has also filed a grievance against Local 195, U.A.W. claiming damages for breach of Article 17 of the collective agreement.

6. Counsel for the applicant informed the Board that an application was also before the Board requesting consent to prosecute the same individuals as are named as respondents in this application. Counsel for the applicants further informed the Board on June 2, 1977 that he had received instructions to withdraw the application for consent to prosecute.

7. It should be noted that this Board and predecessor Boards have many times dealt with the availability of arbitration as an alternative remedy in cases of this nature. In our view, the jurisprudence is that where the collective agreement has been clear on its face, the Board has refused to defer its jurisdiction to that of an Arbitration Board; (see *Harding Carpets*, 56 CLLC ¶18,031, *Quigley Construction Company Ltd. v. International Union of Operating Engineers Local 793*, [1972] OLRB Rep. May 526) and has many times made declarations despite alternative remedies being available. It should also be noted in this case, for what it is worth, that the arbitration remedy being sought by the applicant is not against the present respondents, but against Local 195 U.A.W., and that the writ of summons claiming civil damages is against the respondent employees (out of which arose the injunction proceedings).

8. We are referred to the case of *International Chemical Workers Local 159 v. Kodak Canada Ltd.*, [1977] OLRB Feb. 49 outlining a general presumption in favour of disputes arising out of a collective agreement being settled in arbitration as the preferred forum. With this general presumption, there can be no quarrel and we concur fully with the language in that case in paragraph 9 at p.56, which is most cogent to the case before us, in which the Board said:

"However, once a dispute can be characterized as being something more than just a dispute relating to the interpretation, administration, or alleged violation of a collective agreement, this general presumption must necessarily give way. Although grievance arbitration is the proper forum for the resolution of matters relating to individual collective agreements, it is the Labour Relations Board that has been entrusted with the responsibility for resolving matters that go to the general structure of collective bargaining in this province. Where such matters arise, therefore, it is this Board that provides the proper forum for their resolution, and deferral to arbitration can no longer be the appropriate response."

9. In cases where the employees have returned to work at the time of the hearing, the Board will refuse to issue a declaration except where there has been a pattern of similar past conduct or reasonable apprehension of future similar occurrences. These latter exceptions, in our view, have been adopted because those kind of circumstances go clearly "to the general structure of collective bargaining in this province".

10. We therefore conclude that the existence of alternative remedies in a case such as the present should not preclude the Board's exercise of discretion to make a declaration.

11. We turn now to the facts giving rise to this application. No evidence was called on behalf of the respondents and the facts are clear.

12. The applicant's operations consist of two main departments – the Stamping Department and the Fabrication or Welding Department. On May 12, 1977, at about 6:45 p.m. and immediately following the lunch break, the employees of the Stamping Department, except for some probationary employees and one or two regular employees, did not return to their work stations but went directly to the parking lot. The afternoon Shift Supervisor and, shortly after, two supervisors, talked to the employees informing them that their actions were in violation of the law and requesting them to return. The employees did not return.

13. The third shift is scheduled to start at 10:30 p.m. and as those employees started to arrive at about 10:15 p.m. on May 12, 1977, they were stopped by people from the afternoon shift. The night Shift Supervisor spoke to the third shift employees in the same vein as the afternoon Shift Supervisor had done. The third shift employees did not come in to work that night.

14. On May 12, 1977, the employees in the Fabrication Department remained at work on the afternoon shift. This department has no scheduled third shift.

15. On May 13, 1977 the first shift in the Stamping Department was again manned by the probationary employees and one or two regular employees (out of a total crew of about 50). Additionally, the employees of the Fabrication Department gathered in the parking lot prior to shift starting time and, despite efforts by supervisors to have them start to work, the shift in that department was solely manned by seven probationary employees. Employees of the Stamping Department were blocking the driveway, although a truck was allowed to leave.

16. At about 8:00 a.m. on May 13th, the applicant directed telegrams to the union's President and to the union's International Representative, the latter of whom was en route to an international convention. The telegram was referred to the Plant Chairman and he was directed to have the men return to work.

17. Counsel for the applicant adduced evidence, not contradicted by the respondents, of four previous work stoppages while the predecessor collective agreement was in effect, as follows:

- (a) November 1975 – a walkout of 2-1/2 days duration during which some damage was sustained to company offices and to a cartage truck.

- (b) June 1976 – a walkout lasting somewhat more than one shift.
- (c) October 14, 1976 – a full day shutdown.
- (d) November 1976 – a full day stoppage.

Following the November 1976 occurrence, the applicant expressed its concern in letters dated February 10, 1977 directed to the union's Plant Executive, the union's President and its International Representative. In that letter the applicant stated its intention, in the event of any further stoppages, to pursue any or all remedial actions available to it through the Board and/or the Courts. The applicant received no response to this communication.

18. The Board finds that the work stoppage commencing on May 12, 1977 constituted a strike within the definition of section 1(1) (m) of the Act, and that such strike took place during the currency of a valid collective agreement in contravention of section 63(1) of the Act. The Board further finds that, because of the recent past history of disregard of the established orderly procedures for the settlement of disputes in favour of prohibited action by employees in this bargaining unit, a declaration should be made. The respondents should be made aware that this Board views the course of conduct engaged in over the past 18 months as being such as goes to the general structure of collective bargaining and the promotion of harmonious relations.

19. The Board therefore now declares that the strike engaged in by the respondents commencing May 12, 1977, was unlawful.

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**2088-76-R Donald Corcoran, (Applicant) v. The Graphic Arts International Union, Local 12-L Toronto, (Respondent), v. Graphic Centre (Ontario) Inc., (Intervener).**

**Termination – Collective Agreement – Abandonment – Affect of parties signing collective agreement covering a bargain-unit smaller than a certified unit – Whether bargaining rights abandoned for employees so excluded – Whether excluded employee may bring a termination application.**

**BEFORE:** Ian C.A. Springate, Vice-Chairman and Board Members H.J.F. Ade and E. Boyer.

**APPEARANCES:** C.J. Abbass for the applicant; Douglas J. Wray and Mike R. Zajac for the respondent; Wilfred Walters and Joseph D. Carrier for the intervener.

**DECISION OF THE BOARD:** June 8, 1977.

1. This is an application under section 49 of The Labour Relations Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent. The parties were in agreement that the application was timely.



2. It is common ground that on June 23, 1976 the respondent and the intervener entered into a collective agreement covering certain employees engaged in the lithographic trade. The parties, however, are of different minds as to which employees come within the scope of the bargaining unit covered by the agreement. At the hearing the applicant took the position that the bargaining unit includes all lithographic employees in the intervener's employ. The respondent, on the other hand, contended that the bargaining unit includes only those employees who are members of the respondent trade union or, in the alternative, only union members and those non-members who contribute to the making of lithographic plates. Somewhat complicating this situation is the admitted fact that the applicant himself is not a union member and, as a pressman, is also not engaged in the making of lithographic plates.

3. The portions of the collective agreement which relate to the scope of the bargaining unit are set out below:

"1. The COMPANY recognizes the GRAPHIC ARTS INTERNATIONAL UNION, LOCAL 12-L, as the exclusive representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment for all those members of the Graphic Arts International Union who are employed in the lithographic department on or about offset presses or other lithographic presses and all those employees who contribute in any manner to the making of lithographic plates in its plant located at 31 COMMISSIONERS STREET, TORONTO 2, ONTARIO.

### 3. 'JURISDICTION'

(a) This Agreement applies to and governs the employment of all G.A.I.U. members engaged in the production of Lithography by lithographic, planographic, photolithographic, or gelatine processes, whether direct or offset, and whether it is a trade plant, private, industrial, commercial, photoengraving, or financial, insurance or any other establishment, and whether such operations constitute its principal business or are accessory to some other business enterprise.

(b) The employer recognizes the Graphic Arts International Union as the sole and exclusive bargaining agent for all lithographic employees as defined in paragraph (a) above."

4. The practice of the parties in implementing the collective agreement is not very informative. Most (if not all) employees, whether union members or not, are paid in accordance with the wage rates set out in the collective agreement. Non-members do not participate in the union administered benefit plans set forth in the collective agreement, although the articles in the agreement referring to such plans use the term "employees" rather than union members. Non-members, however, do receive in cash an extra amount to compensate them for the benefits they do not receive under the benefit plans.

5. Article 1 of the collective agreement standing by itself appears to be a complete recognition clause wherein the intervening company recognizes the respondent union as exclusive bargaining agent for a unit of employees defined both in terms of geographic location and classification (albeit that the rather unusual factor of union membership is used as one of the criteria to determine which employees come within the bargaining unit). Absent any consideration of any other articles in the agreement then, it appears that the bargaining unit is as set forth in Article 1, namely:

“all those members of the Graphic Arts International Union who are employed in the Lithographic department on or about offset presses or other lithographic presses and all those employees who contribute in any manner to the making of lithographic plates in (the intervener’s) plant located at 31 COMMISSIONERS STREET, TORONTO 2, ONTARIO.”

6. We turn now to consider the effect of Article 3 of the collective agreement. In our view Article 3 is in the nature of a jurisdictional claim on the part of the respondent trade union, and is not meant to expand or detract from the scope of the bargaining unit set forth in Article 1. In this regard we would note that Article 3 is headed up by the word “Jurisdiction”, that it contains no geographic delimitation, and that on the whole it is worded in a more general fashion than is Article 1. In the alternative, if we are wrong and Article 3 is a recognition clause which conflicts with Article 1 of the agreement, then we are of the view Article 1 must govern on the basis of the general rule that where a conflict exists between an earlier and a later clause in a collective agreement, it is the earlier clause which overrides the later unless the later clause clearly spells out that it is to have an overriding effect.

[See: *Re United Steel Workers and Steel Co. of Canada Ltd.*, (1959) 10 L.A.C. 1969 (J.C. Anderson, C.C.J., chairman.)] This general rule would appear to be particularly applicable when dealing with the recognition provisions in a collective agreement.

7. Having regard to the foregoing we are of the view that the bargaining unit covered by the collective agreement is as set out in Article 1 of that agreement.

8. It is clear from the wording of section 48 of the Act that where there is a collective agreement it is the bargaining unit as set forth in the agreement which must be the subject matter of an application to terminate bargaining rights and not some other unit, such as that as originally set forth in a Board certificate. Further, Article 48(2) stipulates that an application such as this can only be brought by “any of the employees in the bargaining unit defined in a collective agreement.” It is undisputed that in the instant case the applicant is neither a union member nor does he contribute to the making of lithographic plates. This being the case we have concluded that he is not an employee in the bargaining unit and thus not eligible to bring this application. On this ground alone the application cannot succeed.

9. Before leaving this matter we would comment upon certain claims made by counsel for the respondent at the hearing. It was counsel’s submission that although a number of employees who had come within the bargaining unit as originally defined in a certificate from this Board had subsequently been excluded from the scope of the collective agreement (and thus were ineligible to bring an application such as this) the respondent trade union nevertheless retained the bargaining rights for those excluded employees. We are unable to

accept this proposition and would instead adopt the reasoning of the Board in the *Gilbarco Canada Ltd.* case [1971] OLRB Rep. March 155 wherein at page 157 the Board stated:

“It is not incumbent upon the parties to incorporate into their collective agreement the bargaining rights contained in the certificate granted by this Board with the geographic limitation. The parties are free to amend, alter, extend or abridge the bargaining rights contained in the certificate. Where bargaining rights in a collective agreement are not as extensive as those contained in a certificate, then that is *prima facie* evidence of an abandonment of that portion of the bargaining rights contained in the certificate, but not contained in the collective agreement. In effect the collective agreement supplants the rights given by the Board’s certificate and the Board’s certificate is spent once the collective agreement is signed. Or to put it another way the best evidence of the bargaining rights extant are those contained in the collective agreement. In the same way as bargaining rights in a collective agreement supplant bargaining rights in a certificate so too bargaining rights in subsequent collective agreements may supplant bargaining rights contained in prior collective agreements.”

10. In the instant case there is nothing to suggest that in agreeing to restrict the scope of the bargaining unit as contained in the original certificate the respondent was not at the same time also abandoning its bargaining rights with respect to the employees so excluded from the scope of the collective agreement. There was not, for example, any indication of a written agreement wherein the parties to a certificate agreed, as they might have done, to a splitting of the bargaining unit as set forth in the certificate into two smaller units with the respondent retaining bargaining rights with respect to both. Instead the evidence suggests that at all times the respondent and the intervener were dealing with one and only one bargaining unit. This being the case we are of the view that the respondent trade union possesses bargaining rights only with respect to those employees of the intervener as set out in Article 1 of the collective agreement between the respondent and the intervener.

11. Having regard to our conclusion in paragraph 8 above, this application is hereby dismissed.

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**1287-75-R** Teamsters, Chauffeurs, Warehousemen and Helpers Local 880  
 Affiliated with the International Brotherhood of Teamsters, Chauffeurs,  
 Warehousemen & Helpers of America, (Applicant) v. **H. O. Terice Co.**,  
 (Respondent).

**Certification – Reconsideration – Termination – Whether the absence of employees in a bargaining unit justifies reconsideration and revocation of bargaining rights.**

**BEFORE:** Rory F. Egan, Alternate Chairman, and Board Members J. D. Bell and P. J. O'Keeffe.

**APPEARANCES:** *Don Swait for the applicant; Leonard P. Kavanaugh and John F. Coughlin for the respondent.*

**DECISION OF THE BOARD:** June 14, 1977.

1. The respondent has requested that the Board, pursuant to the provisions of section 95(1) of The Labour Relations Act, revoke its decision dated December 15, 1975, together with the certificate issued to the applicant in accordance with that decision.

2. The application is based upon the fact that there have been no employees in the bargaining unit since the 6th of August, 1976. The operation which was being carried on at the date of certification has ceased and the evidence is that there is no present intention of opening the operation again.

3. The evidence is that there was a strike which occurred as a result of the failure of the parties to reach agreement following certification. At the time the strike commenced, there were only four employees in the bargaining unit, all of whom quit the employ of the company. Since the strike, only the sales office has been kept in operation by the respondent.

4. The respondent bases its request on section 95(1) of the Act because none of the other provisions of the Act relating to termination of bargaining rights is appropriate in the circumstances. In support of its request, the respondent relies upon *Genaire Ltd. and International Association of Machinists* [1958] 14 D.L.R. (2d) 201; 18 D.L.R. (2d) 588. This was a case where the Board dismissed an application made under section 44 of the Act by an employer for a declaration terminating the rights of a union which was certified with respect to certain of his employees. The Board dismissed the application on the grounds that the Act did not confer any right upon the employer to make the application and because the Board did not have jurisdiction to hear it. The matter was taken before the Ontario High Court. In his judgment, C.J.H.C. said that the broad powers given the Board under section 68, now section 95(1), are intended to cover situations that are not specifically dealt with in the Act where, in the opinion of the Board, the parties should have relief.

5. The case was appealed and the Court of Appeal stated that, in its view, the Board, when acting under the concluding provisions of subsection 1 of section 68 of The Labour Relations Act [95(1)], which related to the power to vary or revoke a decision, order, declaration or ruling, is not restricted merely to consideration of the facts as they existed when

the Board made its original order, declaration or ruling, but may take into account any facts which arose or have arisen subsequent to the making of that original order which the Board may properly consider relevant to the action, if any, it ought to take concerning such original order. In view of the decision in the *Genaire* case and the circumstances existing in the present case, the request is well founded on the basis of section 95(1) of the Act. (See also *Bakery & Confectionery Workers International Union of America, Local 468 et al. v. White Lunch Limited et al*, 66 CLLC ¶14,110 and *Labour Relations Board of B.C. et al. v. Oliver Co-Operative Growers Exchange*, 62 CLLC ¶15,428.)

6. In situations where an application for termination of bargaining rights has been made by an employer where there are no employees in the bargaining unit at the time of the application, the Board has consistently followed its decision in the *Sole* case, (1949) D.L.S. 7-2105; 52 CLLC ¶17,005, with the language adapted to current legislation. The *Sole* decision arose out of an application for revocation of certification on the grounds that the applicant employer had not had persons covered by the certification in his employment for some time prior to the application for revocation. The original decision states in part:

It is our opinion that regulation 11 under which the present application is made, is not intended to be invoked where, as here, there are no employees in the unit in respect of which revocation of certification is sought; where, in other words, there remain no employees whose wishes in the matter of revocation of certification may be ascertained. As the Board has already had occasion to state, a revocation proceedings is a type of representation proceeding; that is, it has as its objective the determination of a question of representation. An application for revocation of certification under regulation 11 is, in effect, a request that the Board examine into and determine the question whether the employees affected by the application desire to continue to be represented by their certified bargaining agent. The basis upon which revocation of certification may be granted is that "a bargaining agent no longer represents a majority of employees in the unit for which it was certified". That criterion, we suggest, presumes the existence of the unit, or, to state it in another way, presumes the presence in the unit of employees who may signify whether or not they wish the bargaining agent concerned to continue to represent them. In the present instance that condition does not obtain.

7. In the *BLH-Bertram Limited v. Pattern Makers Association of Hamilton and Vicinity* case, [1967] OLRB Rep. Oct. 652, the employer sought a declaration terminating the bargaining rights of the respondent union in a fact situation almost identical to the present one. In that case, the company had closed its foundry operation in which the employees represented by the Pattern Makers Association had been employed. The company stated that it had no intention of re-opening the foundry and that there were no employees in the bargaining unit represented by the union in the employment of the company at the time the application was made. The Board said in the above cited case:

It seems to the Board that, in general, the language used by the Board in the *Sole Case* (1949), D.L.S. 7-2105, is applicable under the present legislation and to the present situation. The language of that case adapted to the present legislation is as follows:

"A [termination] proceeding is a type of representation proceeding, that is, it has as its objective the determination of a question of representation. An application for [a declaration terminating bargaining rights] is, in effect, a request that the Board examine into and determine the question whether the employees affected by the application desire to continue to be represented by their ... bargaining agent. The basis upon which [a declaration terminating bargaining rights] may be granted is that 'a bargaining agent no longer represents ... the employees in [the bargaining unit]'. That criterion, we suggest, presumes the existence of the unit, or to state it in another way, presumes the presence in the unit of employees who may signify whether or not they wish the bargaining agent concerned to continue to represent them. In the present instance that condition does not obtain."

(See also *Scarborough Public Library Board*, [1968] OLRB Rep. May 196; *Andre Construction Company*, [1970] OLRB Rep. Feb. 1375 and the cases cited therein.)

8. The Board finds nothing in the present application which would warrant a departure from the principles outlined in the cases cited above, and the application is accordingly dismissed.

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**0035-77-M Industrial Wire & Cable Company, (Employer), v. United Steelworkers of America, Local 7608, (Trade Union).**

**Strike – Arbitration – Effect of strike occurring during statutory freeze – Whether arbitration available under terms of old or new collective agreement.**

**BEFORE:** M. G. Picher, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

**APPEARANCES:** *Corinne Murray and R. B. Weeks for the employer; L. A. MacLean and Frank Berry for the trade union.*

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**DECISION OF THE BOARD:** June 3, 1977.

1. This is a reference of a question to the Board by the Minister of Labour pursuant to section 96 of The Labour Relations Act. The issue is whether the Minister has the authority, in the circumstances of this case, to appoint a member of an arbitration board pursuant to her powers under section 37(4) of the Act.

2. Section 37(4) is as follows:



“Notwithstanding subsection 3, if there is failure to appoint an arbitrator or to constitute a board of arbitration under a collective agreement, the Minister, upon the request of either party, may appoint the arbitrator or make such appointments as are necessary to constitute the board of arbitration, as the case may be, and any person so appointed by the Minister shall be deemed to have been appointed in accordance with the collective agreement.”

3. The facts are not in dispute. The employer and trade union were privy to a collective agreement which remained in effect until August 17, 1976. It ended on that date because on June 30, 1976 the union gave notice of its desire to renegotiate. By Article 34 of the agreement that action brought the agreement to an end on its termination date. Negotiations were slow to yield a new contract; the parties proceeded through conciliation and on October 4, 1976 the Minister issued a “no board report”, the effect of which was to place the parties in a lawful position to strike or lock-out on October 20, 1976.

4. In the interim the national day of protest of the trade union movement against the Anti-Inflation Act took place on October 14, 1976. The employer alleges that its employees engaged in a work stoppage on that day and that in relation to that action by its members the union committed a breach of the “no strike” provision of the collective agreement which was continued in effect by the operation of section 70(1) of the Act. The employer submits that redress for the alleged breach of duty is available to it by means of the arbitration provision of section 70(3) of the Act.

5. The relevant sections are as follows:

70.(1) “Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) Seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board, as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(3) Where notice has been given under section 45 and no collective agreement is in operation, any difference between the parties as to whether or not subsection 1 of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 37 applies *mutatis mutandis* thereto."

6. On October 22, 1976 a new collective agreement was executed between the parties in the preliminary form of a memorandum of settlement. It was ratified on October 25, 1976. One of the changes imported into the new agreement was to substitute a single arbitrator for the three man arbitration board that had been provided as the final dispute settling mechanism in the prior agreement. The new agreement was made retroactive to August 18, 1976 and will remain in effect until August 17, 1977.

7. On November 15, 1976, some weeks after the new agreement was made, the employer served notice on the union of a grievance respecting the October 14th work stoppage. The employer takes the position that the grievance should be proceeded with under the arbitration provisions of the prior collective agreement pursuant to section 70(3) of the Act. By letter dated February 18, 1977 it served notice of the appointment of its nominee to the tripartite board of arbitration. The union has steadfastly refused to appoint its nominee. It takes the position that any arbitration in respect of the events of October 14th must be proceeded with under the arbitration clause in the new agreement. Counsel for the union submits that since October 14, 1976 is within the period embraced retroactively by the new agreement, that is the document that must govern any arbitration of that issue. He therefore submits that the Minister is without authority to appoint a union nominee to a tripartite board of arbitration under the prior collective agreement.

8. The issue, therefore, is whether section 70(3) of the Act applies in the facts of this case. The answer to that question must depend on an interpretation of that section.

9. The union submits that section 70(3) of the Act must be read to mean

"Where notice has been given under section 45 *and at the time of the filing of a grievance* no collective agreement is in operation ... any difference between the parties as to whether or not subsection 1 of this section was complied with may be referred to arbitration ... as if the collective agreement was still in operation." (emphasis added)

According to the employer that subsection must be read to mean

"Where notice has been given under section 45 *and at the time of the act or events in dispute* no collective agreement is in operation ... any difference between the parties as to whether or not subsection 1 of this section was complied with may be referred to arbitration ... as if the collective agreement was still in operation." (emphasis added)

The question which this reference raises to the Board, apparently for the first time, is which of these two interpretations reflect the correct meaning and intention of subsection 3 of section 70 of the Act.

10. The language of the subsection would support either interpretation. On the point in issue the subsection is ambiguous. As Lord Reid has said:

It is always proper to construe an ambiguous word or phrase in light of the mischief which the provision is obviously designed to prevent, and in light of the reasonableness of the consequences which follow from giving it a particular construction. (*Gartside v. I.R.C.* [1968] A.C. 553 at 612).

We turn, then, to interpret section 70(3) in the light of the overall scheme and intention of the Act.

11. It is apparent on the face of the Act that section 70(1) was intended by the Legislature to guarantee a period of time after the expiry of a collective agreement during which the parties can be secure in the knowledge that the terms of their collective agreement continue unchanged. The period provided extends up to the time that a strike or lock-out becomes permissible or until the trade union's bargaining rights are terminated, whichever occurs first. (see sections 63(2), 49 and 53(2) of the Act.)

In other words the Act provides, insofar as possible, a period of industrial relations security that complements the calm or restraint that is statutorily imposed before either party may have recourse to the ultimate bargaining sanctions of strike and lock-out. The Act acknowledges the ultimate necessity of the strike and lock-out as part of the collective bargaining process. But the scheme of the Act also reflects a recognition of the social and economic costs of those sanctions and provides a range of means to promote settlement short of those measures of last resort. The freezing of pre-existing contract rights in that crucial period of time is therefore a vital part of the Act's overall scheme to promote contract settlement prior to recourse to strikes and lock-outs.

12. As with any statutory or contractual right, the freeze period will be effective only if it is ultimately enforceable. Section 70(3) of the Act is the expression of the Legislature that arbitration should be available to the parties as the enforcement mechanism to protect the rights that have been preserved by the freeze period. But it does more. The availability of arbitration operates to safeguard not only the contract rights of the parties that have been preserved but also to safeguard the operation of the freeze period itself. No party will lightly breach the term of a collective agreement that is frozen by section 70(1) where to do so would render that party liable to arbitration proceedings and the risk of an ensuing award of damages. By making recourse to the arbitration process available to the parties in respect of breaches of contract during the freeze period, the Legislature has created a mechanism that allows the parties themselves to ensure that the section 70(1) freeze period will be respected. It has thus made a provision, integral to the overall scheme of the Act, whereby the climate for settlement will, to that extent, be self-preserving.

13. It is, therefore, clear that section 70 was intended to promote a pre-strike, pre-lockout climate for settlement for a fixed period of time and that the arbitration remedy given by section 70(3) provides the procedural muscle to protect that climate. The compelling inference is, therefore, that the Legislature intended that the arbitration remedy should always be available to keep inviolate the period of contract security that it has imposed on the parties by enacting the pre-strike, pre-lockout freeze period. It would make no sense and



be contrary to the scheme of the Act if arbitration should be available in some cases of breach of contract in the freeze period but not in others. But that is precisely the result that is implicit in the interpretation of section 70(3) put forward by the union.

14. The union says, in effect, that the time of filing of the grievance is the time at which there must be no collective agreement in operation in order to trigger the procedures provided by section 70(3). It argues that where, as here, a new collective agreement is in place when the grievance is filed any arbitration of that grievance must be under the procedures of the new agreement. In this case that would appear to work no hardship on the employer since the new agreement is retroactive and embraces the time that the events in dispute occurred.

15. But what if the agreement in this case were not retroactive? According to the interpretation of the trade union the procedures of section 70(3) would not be triggered in that instance because the new collective agreement would have been in operation at the time the grievance was filed, and no arbitration would be available to the employer because the new agreement would have no retroactivity to cover the events that occurred during the freeze period. In other words, according to the union, whenever a new agreement is in operation at the time that a grievance is filed relating to a dispute that arose during the freeze period, section 70(3) will not operate and the party's right to private arbitration respecting events that occur in that period of time will depend entirely on whether the new agreement is or is not retroactive to that period.

16. We do not think that the Legislature intended that result. It is a result that would undermine the integrity, and therefore the effectiveness, of the freeze period itself. While it may be that recourse could always be had to this Board for the breach of the freeze period insofar as it would be a breach of the Act, the Legislature specifically intended private arbitration as the primary mechanism for self-enforcement to protect the operation of that period. That intention would be defeated if one of the parties could avoid liability to arbitration in respect of a breach of contract that arose during the freeze period by rushing to conclude a new agreement before a grievance is filed in respect of that breach. Conversely, a party seeking to grieve the breach would tend to refuse to enter a new agreement until it had the opportunity to take all of the steps necessary to prepare and file its grievance. That result would tend to discourage, or at least delay, settlement, an effect contrary to the very spirit and purpose of The Labour Relations Act.

17. No such incongruity arises if the employer's interpretation of section 70(3) prevails. In our view that interpretation is more consistent with the overall scheme and intention of The Labour Relations Act. We do not accept the suggestion that the Legislature would have intended private arbitration to be available to the parties in some cases of breach of the freeze provisions but not in others. The enforcement provision of section 70(3) is not philanthropically inspired; it must be understood as intended to protect not only the extended rights of the parties, but more fundamentally, to protect the statutory period of restraint, an integral part of the labour relations process designed to encourage settlements and promote industrial peace. In our view that intention of the Legislature is more rationally and consistently achieved where access to arbitration is always available to a party that has been the victim of the breach of the terms of a collective agreement during the freeze period. Therefore the interpretation of section 70(3) put forward by the employer is more compelling as a reflection of the intention of the Legislature.

18. In conclusion, therefore, we find that section 70(3) applies in the facts of this case and the tripartite board of arbitration under the prior collective agreement is the appropriate forum to deal with the grievance filed. The Minister is advised that she has the authority to exercise her powers under section 37(4) of the Act to make such appointments as are necessary to constitute the board of arbitration.

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**1568-76-U Libby, McNeill & Libby of Canada, Limited, (Applicant), v. United Automobile, Aerospace & Agricultural Implement Workers of America and others listed on attached page, (Respondent).**

**Strike – Collective Agreement – Effect of A.I.B. rollback on otherwise valid collective agreement.**

**DECISION OF BOARD MEMBER J. E. C. ROBINSON, Q.C. June 23, 1977.**

1. This was an application under Section 82 of The Labour Relations Act. The employer requested that the Board issue a declaration that the union had threatened an unlawful strike and direct that such threats cease. The facts were relatively straight forward and were not in dispute. The parties entered into a collective agreement in late November of 1976. This collective agreement was duly ratified and was therefore valid and binding in accordance with Section 42 of The Ontario Labour Relations Act. However, the agreement provided for a compensation package which exceeded the arithmetic guidelines prescribed by the Federal Anti-Inflation legislation and accordingly, the payment of any sum in excess of those guidelines could very well leave the employer open to quasi-criminal liability. Since the amounts payable exceeded the numerical guidelines, the collective agreement had to be referred to the Federal Anti-Inflation Board which would render its opinion as to whether the excess payments were permitted in the special circumstances of these parties. The collective agreement itself made no mention of the Federal legislation.

2. The employer, seeking to avoid criminal responsibility, declined to pay any sum in excess of the guidelines at least until the A.I.B. had rendered its opinion as to the legality of such payments. It should be noted that this course of action is the one advocated by both the A.I.B. itself and by the Administrator of the Anti-Inflation legislation. Both have indicated that an employer, prior to an A.I.B. ruling should not pay employees any more than the applicable arithmetic guideline, and that for an employer to do so might well put him in breach of the law. This matter has already been canvassed by this Board in the *Mole Construction Co.* decision [1976] OLRB Rep. Aug.391(at para.13). The panel in that case agreed that this was a reasonable interpretation of the Anti-Inflation legislation, and in my view, it is the proper position for an employer to take. In this respect it should be noted that the employer is not seeking to avoid any obligation but rather is prevented from performing that obligation until performance is shown to be legal. There was no question in this case that if the A.I.B. approved the excess payments, they would, infact, be paid.

3. In the *Mole Construction Co.* case the trade union took the view that the company's actions were illegal and sought relief at arbitration, as it was entitled and, in-



deed, required to do. In this case, however, the union threatened an unlawful strike in order to enforce compliance with the collective agreement and redress what it considered to be a violation of the agreement. Since the union itself was asserting that the collective agreement was valid and binding it knew, or ought to have known, that this conduct was unlawful. I agree, therefore, with the majority finding that the strike threats which occurred in November, prior to the A.I.B. ruling, were illegal. I also wish to record my disagreement with the views of this panel, and those of the panel in the *Croven* case, as to the effect of a "rollback". In my submission, both the *Croven* decision and the remarks of the majority herein are based upon an erroneous interpretation of the Federal legislation.

4. The purpose of the Anti-Inflation Board is set out in section 12 of the *Anti-Inflation Act*. The Board has the responsibility of (a) indentifying proposed changes in, *inter alia*, compensation which in its opinion are likely to have a significant impact on the economy of Canada; and (b) endeavouring through consultations and negotiations with the parties involved to modify such changes so as to bring them within the limits and spirit of the guidelines.

5. It is evident that the Anti-Inflation Board ruling is simply advisory and does not finally resolve the legality of the proposed payment. If a party is dissatisfied with the A.I.B. advisory opinion it may be referred to the Administrator and it is he, and only he, who has the power to make a binding legal decision. Thereafter, there exists a further appeal, in some circumstances, to the Anti-Inflation Appeal Tribunal. The Administrator is in no way bound by the A.I.B. opinion which, as I have already suggested, is merely advisory. The Administrator may well approve the proposed changes notwithstanding the A.I.B.'s opinion. It appears, therefore, that whatever may be the legal effect of non-compliance with the Federal statute, that non-compliance cannot be determined until the Administrator rules; and that ruling may well be at variance with the A.I.B.'s advisory opinion.

6. This Board, in the *Croven* case, ruled that the mere issuance of the A.I.B.'s opinion voids the collective agreement and with this conclusion I must respectfully disagree. Surely it would be unusual if this were the case, since it leaves open the distinct possibility that, should a party apply to the Administrator, it may turn out that the "void" agreement is not illegal at all. The Administrator (who alone has the power to make a *binding decision*) may determine that there has been no contravention of the Act. In my view, the effect of non-compliance with the Federal legislation cannot be assessed until the fact of non-compliance is clearly determined, and that determination is not made in the A.I.B.'s advisory opinion, but must wait at least until the Administrator has made a binding decision.

7. I prefer the view that even clear non-compliance does not void the collective agreement because that portion of the compensation package which exceeds the guidelines is severable from the body of the collective agreement. The intention of Parliament was not to prohibit collective agreements, or cause labour relations uncertainty, but only to ensure that amounts in excess of the guidelines which are not justifiable shall not be paid. As was noted by the Board in the *Mole Construction* case, the Anti-Inflation legislation does *not* specifically void collective agreements. In my view the agreement remains in full force and effect and consequently the "no strike/lockout" provision subsists. Parties negotiating in today's environment must be deemed to be aware of the guidelines and to know that payments in excess thereof may not be allowed. It seems to me that this Board should adopt a solution which is consistent with labour relations stability, the integrity of collective agree-



ments, and the expressed intention of the Federal legislation to restrain unjustifiable compensation increases. All of these objectives can be met by a finding that the agreement subsists but that the excess amounts are not payable by operation of the Federal statute. This is in my view the proper result both from a legal and a labour relations point of view.

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**1518-76-R** Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant), v. **Silverwood Dairies** Division of Silverwood Industries Limited, (Respondent), v. Office & Professional Employees International Union, Local 743, (Intervener).

**Reconsideration – Timeliness – Effect of section 53(2) on earlier Board decision.**

**BEFORE:** M. G. Picher, Vice-Chairman and Board Members O. Hodges and F. W. Murray.

**DECISION OF THE BOARD:** June 14, 1977.

1. By letter dated April 12, 1977, the applicant has requested a reconsideration of the decision of the Board herein dated March 11, 1977. By its letter dated April 27, 1977 the intervener has likewise requested a reconsideration. Neither party has requested a hearing.
2. The applicant firstly submits that the Board's decision is wrong in the light of *Croven Limited* (Board File No. 1983-76-U), and *Ferranti-Packard Limited* two decisions of this Board which are subsequent in time to the decision in the instant case. It submits secondly that the Board erred by relying on extrinsic evidence to interpret the memorandum of settlement. Thirdly it submits that the Board erred in disregarding the paragraph in the collective agreement that provides that the parties "re-negotiate the method of implementing the roll-back". Fourthly the applicant submits that the A.I.B. contingency clauses should be

read as relating only to the wages portion of the memorandum and should not be seen as imposing conditions on the existence of the entire agreement. Lastly the applicant submits that no effect should be given to the extrinsic evidence because the conduct of the parties should not affect the determination of the existence of a collective agreement.

3. The Board's jurisdiction to reconsider its decisions is found in section 95(1) of The Labour Relations Act:

95. – (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

4. In order to avoid abuse of the reconsideration provision and to insure some finality to the determination of parties' rights before it, the Board has adopted principles not unlike those of the courts respecting what must be established in order to succeed on an application for reconsideration. Generally the Board will not reconsider unless the applicant intends to adduce new evidence which could not have been previously obtained by reasonable efforts and it can be established that the new evidence would, if proved, be likely to make a substantial difference to the outcome of the case. Secondly the Board will allow reconsideration to consider representations or objections not already considered by the Board and which the applicant had no previous opportunity to raise. (*See International Nickel Company of Canada*, 63 CLLC ¶16, 284; *The Detroit River Construction Limited*, 63 CLLC ¶16,260; *National Steel Car Corporation Limited* [1966] OLRB Rep. Apr. 55; *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *York University* [1976] OLRB Rep. Apr. 187).

5. In this case the applicant does not seek to adduce new evidence, nor does it request a hearing for the purposes of making oral representations. It merely makes a series of written arguments in its letter to the Board and requests a variation of the earlier order. The question then is whether the arguments made are ones that the applicant would not previously have had an opportunity to make before the Board.

6. It is clear that all but the first of the applicant's representations were arguments which it had available to it at the time of the hearing. In fact the Board's notes indicate that in one form or another all of those arguments were made and were considered. This aspect of the applicant's request seeks a kind of appeal which would have us reopen and reconsider arguments which have already been made. That is not the purpose or intention of section 95(1) of the Act.

7. The applicant's request that the Board reconsider its earlier decision in the light of subsequent cases rests on equally doubtful ground. The legitimate need of parties involved in the collective bargaining process to rely on the finality of the determination of their rights by the Board would be ill-served, to say the least, if such settled rights must be called into question every time a different, or arguably different, decision of the Board was

rendered in some subsequent case. As was stated by the Board in *The Corporation of the County of Lambton 65 CLLC ¶16,057*:

It is obvious that whatever rights an applicant may have to make a new application, some limit must be imposed as to the time and circumstances under which the Board should reopen and review a former decision on the grounds that in the meantime the Board has rendered another decision which appears to indicate that the Board's earlier decision may be erroneous. There must obviously be instances in the growing jurisprudence of this Board where interpretations of law and policy and findings of fact applied by the Board in earlier cases will, as a result of new arguments and experience and further consideration, be decided differently in later cases. It would, however, be too much to say that whenever the Board alters or overrules an interpretation of law or policy of finding of fact which it had followed or adopted in earlier cases, that it must or should in all events, review and reopen all such earlier cases whatever the circumstances or the length of time which may have elapsed in the meantime. In the courts the fact that the law as applied in an earlier judgment in another case is later overruled by a higher court in another case, does not afford, on that basis alone, a ground for allowing a litigant in the former case leave to appeal where the time prescribed by the rules therefore has expired. (See *Re Blackwell* (1962) D.L.R. (2d) 369.)

8. But quite apart from that concern, and assuming, without finding, that the applicant's request in that respect is not inappropriate, the Board is satisfied that there is nothing in the *Croven* or *Ferranti-Packard* decisions to change its view of the proper disposition of the instant case.

Both of those cases are distinguishable on the facts. The *Croven* decision is of no application since it involved an agreement that made no express provision for the eventuality of an A.I.B. rollback, unlike the memorandum of agreement in the instant case. The document in *Ferranti-Packard* did contain an A.I.B. rollback contingency clause similar, though not identical to, the AIB clauses that appear in the memorandum of agreement in the instant case. In that case, however, the extrinsic evidence adduced led the Board to conclude that an agreement subsisted between the parties, which was not conditional on A.I.B. approval: at paragraph 12 the Board stated:

12. The uncontradicted evidence of Bates was that this document had been ratified by the employees on September 10th. Following ratification, the applicant had increased wages, calculated and paid retroactive wages, and had instituted changes in the benefit plan. According to Bates, during the last six months, the applicant had treated the Memorandum of Agreement as amounting to a collective agreement and this position had not been contested in any way by the respondent union. In fact, the union had apparently filed grievances relating to matters dealt with in the Memorandum of Agreement.

9. In the instant case the unchallenged extrinsic evidence was to the opposite effect. The parties did not implement the terms of the memorandum of settlement and the board



found that their actions were entirely consistent with the position of the intervener that they did not intend the memorandum to be an unconditional and operative agreement up to and at the time of the alleged open period. The Board in the *Ferranti-Packard* case at paragraph 27 expressly recognized the factual distinction between that case and this one:

Here, the parties have made an *unconditional* agreement, as *contrasted* with the agreement made in *Silverwood Dairies*, and have put their minds to the possibility of a roll-back. (emphasis added).

10. In the light of the foregoing the Board is satisfied that there is nothing in the applicant's request to justify reconsideration of the Board's decision. Its application for reconsideration is hereby dismissed.

11. The intervener submits that the Board made an error in paragraph 21(b) of its decision when it stated that if the 1976 agreement were not approved under the Anti-Inflation Act an application would be timely in May of 1977 since at that time one year would have elapsed from the appointment of the Conciliation Officer. Counsel for the intervener points out that by the terms of section 53(2) an application might still be barred at that time if the requisite 30 days after a "no board report" by the Minister had not then elapsed.

12. Section 53(2) governs the timeliness of an application for certification and it provides as follows:

53 (2) Where notice has been given under section 45 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operate or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless, following the appointment of a conciliation officer or a mediator, if no collective agreement has been made,

- (a) at least twelve months have elapsed from the date of the appointment of the conciliation officer or a mediator; or
- (b) a conciliation board or a mediator has been appointed and thirty days have elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties; or
- (c) thirty days have elapsed after the Minister has informed the parties that he does not consider it desirable to appoint a conciliation board,

whichever is later.

13. In view of the words "whichever is later" which operate as an overall proviso to the section, it is clear on the face of the Act that if the "no board report" should come any time after 30 days prior to the anniversary of the appointment of the Conciliation Officer, the open period will begin at a point in time later than one year after the Officer's appointment. The Board, therefore, erred in paragraph 21(b) of its decision dated March 11, 1977. That paragraph is hereby amended to read:

- (b) If the 1976 agreement is not approved under the Anti-Inflation Act an application in May of 1977 (being more than one year after the appointment of the Conciliation Officer) or an application 30 days after the issuing of a "no board report" whichever is later, will be timely if no other agreement is then in operation.

14. It should be noted that this variation of the earlier Order does nothing to alter the Board's fundamental observation in paragraph 21 of that decision that in this case the existence of an open period is in all circumstances preserved.

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**0283-77-R** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant), v. Windsor Tube & Metal Inc., (Respondent).

**Certification – Bargaining Unit – Timeliness – Whether bargaining unit is determined as of the day of application or actual moment of mailing application.**

**BEFORE:** E. Norris Davis, Vice-Chairman, and Board Members E. Boyer and W. H. Wightman.

**APPEARANCES:** Bruce K. Lee and Kenneth Simpson for the applicant; D. H. Jack, Robert D. Howe and John Kornelsen for the respondent.

**DECISION OF THE BOARD:** June 22, 1977.

1. The name "Windsor Tube and Metal Incorporated" appearing in the style of cause of this application as the name of the respondent is amended to read: "Windsor Tube & Metal Inc."
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of The Labour Relations Act. The parties have agreed upon the description of the bargaining unit which they consider to be appropriate for collective bargaining. Because of the issue raised by the respondent concerning the number of employees in the bargaining unit, it is necessary to set out the sequence of events which occurred on May 11, 1977.

4. On May 11, 1977, this application was sent to the Board by registered mail. The registration stamp affixed by the post office does not indicate the time of mailing, but at the hearing, the respondent suggested that the application was mailed sometime after 2:30 p.m. on May 11th. On that same day, 7 of the 12 employees in the proposed bargaining unit were discharged – allegedly because they were late in returning from their lunch break. It would appear, therefore, that these 7 employees may have been discharged prior to the time at which the application was mailed, although they were clearly employed for at least part of May 11th.

5. Section 7(1) of The Labour Relations Act requires the Board to “ascertain the number of employees in the bargaining unit at the time the application was made”. The respondent contends that these 7 discharged persons were not “employees” in the bargaining unit at the time that the application was made, since their employment status had been terminated prior to the moment of mailing. In other words, the respondent argues that the determination of employment status cannot be made simply by reference to the day on which the application is filed but, rather, must be made with reference to the status of the employee at the moment of mailing. In support of this position the respondent referred the Board to Rule 50(1) of the Board’s Rules of Practice which provides as follows:

50. – (1) Where a document is required to be filed by these Rules, filing shall be deemed to be made,

(a) at the time it is received by the Board; or

(b) where it is mailed by registered mail addressed to the Board at its office at 400 University Avenue, Toronto 2, Ontario, at the time it is mailed.

6. In essence, the respondent suggests that the words “time it is mailed” mean “moment it is mailed” rather than “day it is mailed”.

7. The 7 discharged persons have all filed complaints pursuant to section 79 of the Act alleging that they had been discharged for their trade union activity. If successful, their employment status will be deemed not to have been interrupted. Accordingly, the employer requests that the Board defer its decision on the status of these employees until the section 79 proceeding is completed. If that complaint is found to be without merit, it is argued that these employees are not in the unit, since their employment had been lawfully terminated prior to the time when the application was made.

8. The Board has considered the representations of counsel for the respondent employer. The Board has always taken the view that employee status is determined as of *the day* that the application for certification is made, rather than the precise time of mailing. In this respect, the phrase “time of mailing” in the Rule is intended to mean the *date of mailing* – which is all that the registration stamp would indicate. Section 102(2) of The Labour Relations Act provides as follows:

102. – (2) An application for certification or accreditation or for a declaration that a trade union or employers’ organization no longer represents the employees or employers, as the case may be, in a bargaining



unit, if sent by registered mail addressed to the Board at Toronto, shall be deemed to have been made *on the date* on which it was so mailed. (emphasis added)

9. There can be no doubt that the application for certification is deemed to have been made *on the date* on which it is mailed. In our view, this is the time the application was made for the purposes of section 7(1) of the Act. Indeed, the schedules which the employer is required to submit to the Board, together with its reply (and which must be in the form specified by the regulations), all require the employer to list employee status *on the date* of the application for certification. There is no doubt in this case that the 7 discharged persons were "employees" on the date on which the application was mailed and, therefore, by virtue of section 102, were "employees" on the date on which the application was mailed and, therefore, by virtue of section 102, were "employees" "when the application was made". In our view, therefore, these 7 persons were employees "at the time the application was made" and it is unnecessary to defer our consideration until the completion of the section 79 proceedings. Whatever the outcome of those proceedings, the employees' status cannot be affected, since it is our view that they were, in fact, employees in the bargaining unit at the time the application was made. Even if it can be said that the phrase "time the application was made" is ambiguous, it is our view – having regard to section 102 and the entire scheme of the Act and Rules – that employee status is to be measured as at the *date* on which the application is made. See *United Steelworkers of America v. Amplifone Canada Ltd. v. Group of Employees*, [1967] OLRB Rep. Dec. 840 where the Board found that employees who presented themselves at their place of work in the reasonable expectation of carrying on their normal employment must be found to be employed on the date they so reported, notwithstanding the fact that they were laid off indefinitely without performing any work on that same date.

10. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Windsor, Ontario, save an except foremen, those above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

11. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 20, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. A certificate will issue to the applicant.







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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1977

### BARGAINING AGENTS CERTIFIED DURING MAY

#### No Vote Conducted

**7347-74-R:** Mechanical Contractors Association Niagara (Applicant) v. Sheet Metal Workers International Association Local Union 537 Peninsula Branch (Respondent) v. Hamilton and District Sheet Metal Contractors Inc. (Intervener).

Unit: "all employers of journeymen sheet metal workers and registered apprentices for whom the respondent has bargaining rights in the Regional Municipality of Niagara and the County of Haldimand lying east of a line formed by Haldimand County Roads 36 and 9 north to 17 along 17 to the junction with 15 along 15 to Regional Road 63 to and along Regional Road 16 as it extends from its intersection with Regional Road 63 to the Town of Smithville and Regional Road 14 as it extends to Smithville to Lake Ontario in the industrial, commercial and institutional sector and the residential sector of the construction industry." (30 employers in the unit).

**1495-76-R:** The Federation of Community Agency Staffs (Applicant) v. Big Sister Association of Metropolitan Toronto (Respondent).

Unit: "all persons regularly employed by the respondent for not more than twenty-four (24) hours per week and all students employed by the respondent during the school vacation period, employed at the respondent's facilities known as Huntley Youth Services in Metropolitan Toronto, save and except house directors, supervisors, persons above the rank of supervisor, office and clerical staff and persons above the rank of supervisor, office and clerical staff and persons covered by the subsisting certification." (3 employees in the unit).

**1889-76-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. National Auto Radiator Manufacturing Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all office and clerical employees of the respondent in Windsor, Ontario, save and except manager, foremen and supervisors, persons above the rank of manager, foreman and supervisor, sales representatives, buyers, tool engineer, cost analyst, personnel secretary, time study technicians, accounting supervisors, management trainees, shipping clerk, production control clerk and students employed during the school vacation period." (15 employees in the unit).

**2013-76-R:** Association of Commercial and Technical Employees, Local 1704, C.L.C. (Applicant) v. The Berlitz School of Languages (Respondent) v. Group of Employees (Objectors).

Unit #1: "all language instructors employed by the respondent in Metropolitan Toronto save and except the Director, the Secretary to the Director and persons regularly employed for not more than 24 hours per week." (15 employees in the unit). (*Bargaining Unit #2 – See Certification Dismissed Subsequent to Post-Hearing Vote*).

**2113-76-R:** Labourers' International Union of North America, Local 527 (Applicant) v. R. J. Nicol Construction (1975) Limited (Respondent).



Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (36 employees in the unit).

**2132A-76-R:** International Association of Machinists and Aerospace Workers, District Lodge 717 (Applicant) v. Hawker Siddeley Canada Ltd., Forestry Equipment Division (Respondent).

Unit: "all shop employees save and except office and clerical employees, technical staff, foremen, persons above the rank of foreman and security guards employed by the respondent in the area of the Regional Municipality of Peel South of Highway 7." (57 employees in the unit). (*Having regard to the agreement of the parties*).

**2195-76-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Burlington (Respondent).

Unit: "all employees of the respondent in Burlington employed in the Transit Division of the Department of Public Works save and except foremen, those above the rank of foreman, clerical staff, persons employed for not more than 24 hours per week and students employed during the school vacation period." (60 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision [1977] OLRB Rep. May*).

**2205-76-R:** Labourers' International Union of North America, Local 247 (Applicant) v. Traders Sportscraft Limited Millhaven Ontario (Respondent).

Unit: "all employees of the respondent in the County of Lennox and Addington save and except supervisor, persons above the rank of supervisor, sales and office staff." (7 employees in the unit). (*Having regard to the agreement of the parties*).

**0007-77-R:** Labourers' International Union of North America Local 247 (Applicant) v. G & B Drywall (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Lennox and Addington, and the county of Frontenac and the Townships of Rear of Leeds and Landsdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**0024-77-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Milrod Metal Products (Respondent).

Unit: "all employees of the respondent in Mississauga, Ontario save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (191 employees in the unit). (*Having regard to the agreement of the parties*).

**0029-77-R:** Canadian Union of Public Employees (Applicant) v. Fountainview Gardens Nursing Home (Respondent).

Unit #1: "all employees of the respondent at Orangeville, Ontario save and except supervisors, persons above the rank of supervisor, professional medical staff, registered nurses, graduate and undergraduate nurses, pharmacists, dietitians, physiotherapists, occupational therapists, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (11 employees in the unit). (*Certified*).

Unit #2: "all employees of the respondent at Orangeville, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (3 employees in the unit). (*Dismissed*).

**0037-77-R:** Amalgamated Clothing & Textile Workers Unions (Applicant) v. Harvey Woods Limited (Hamilton Division) (Respondent).

Unit: "all employees of Harvey Woods Limited, at its plant in Hamilton, Ontario, known as Hamilton Division, save and except foremen, foreladies, persons above the rank of foreman, forelady, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (20 employees in the unit). (*Having regard to the agreement of the parties*).

**0040-77-R:** Ontario Nurses' Association (Applicant) v. The Greater Niagara General Hospital (Respondent).

Unit: "all registered and graduate nurses employed by the respondent engaged in a nursing capacity for not more than twenty-four (24) hours per week save and except head nurses and persons above the rank of head nurses." (106 employees in the unit).

**0055-77-R:** United Glass and Ceramic Workers of North America, AFL-CIO-CLC (Applicant) v. Allan G. Cook Limited (Respondent).

Unit: "all employees of the respondent at the quarry located on Quarry Road, Coldwater, Ontario, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (13 employees in the unit). (*Having regard to the agreement of the parties*).

**0059-77R:** Brewery, Soft Drink, Distillery, Distributors & Miscellaneous Workers, Local 1000, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Potter Distilleries of Ontario Ltd. (Respondent).

Unit: "all employees employed by Potter Distilleries of Ontario Ltd., save and except foreman, Persons above the rank of foreman, Office and Sales Staff at (Port Weller) St. Catharines, Ontario." (3 employees in the unit).

**0060-77-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Coxco Construction Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**0067-77-R:** United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC (Applicant) v. Thermoset Plastics Ltd. (Respondent).

Unit: "all employees of the Company in the City of Belleville save and except foremen, foreladies, persons above the rank of foreman and foreladies, office and sales staff." (42 employees in the unit).

**0068-77-R:** Canadian Union of Public Employees (Applicant) v. Cobourg District General Hospital Association (Respondent).

Unit: "all employees of the respondent at Cobourg, Ontario regularly employed for not more than 24 hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, persons employed by Versafoods Limited in the Hospital, technical personnel, supervisors, persons above the rank of supervisor, chief engineer, office and clerical staff, students employed during the school vacation period and persons covered by the Ontario Labour Relations Board certificate dated September 9, 1974." (37 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision [1977] OLRB Rep. May*).

**0076-77-R:** Association of Commercial and Technical Employees, Local 1704, C.L.C. (Applicant) v. Metro Tenants' Legal Services (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except persons on the Board of Directors." (3 employees in the unit).

**0077-77-R:** Association of Commercial and Technical Employees, Local 1704, C.L.C. (Applicant) v. Students' Legal Aid Society (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except persons on the Students' Legal Aid Society Executive." (4 employees in the unit). (*Having regard to the agreement of the parties*).

**0079-77-R:** Association of Commercial and Technical Employees, Local 1704, C.L.C. (Applicant) v. Injured Workmen's Consultants (Respondent).

Unit: "all of employees of the respondent in Metropolitan Toronto." (9 employees in the unit). (*Having regard to the agreement of the parties*).

**0082-77-R:** Brewery, Soft Drink, Distillery, Distributors & Miscellaneous Workers, Local 1000, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Hamilton Radiator Service Limited (Respondent).

- and -

**0083-77-R:** Brewery, Soft Drink, Distillery, Distributors & Miscellaneous Workers, Local 1000, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Hamilton Radiator Service Limited (Respondent).

Unit: "all employees employed by Hamilton Radiator Service Limited, in the City of Burlington, and in the City of Hamilton, save and except foremen, persons above the rank of foreman, and office staff." (30 employees in the unit).

**0093-77-R:** Labourers' International Union of North, America, Local 183 (Applicant) v. Tito Construction Limited (Respondent).

Unit: "All construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

**0094-77-R:** Christian Labour Association of Canada (Applicant) v. Carey's Welding & Sandblasting Ltd. (Respondent).



Unit: "all employees of the respondent at Port Robinson in the Regional Municipality of Niagara save and except foremen, persons above the rank of foreman and office staff." (3 employees in the unit). (*Having regard to the agreement of the parties*).

**0096-77-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Lakeshore Sand Company Division of Jason Hydraulic Pumping Ltd. (Respondent).

Unit: "all employees of the respondent in Hamilton, save and except foremen, persons above the rank of foreman and office staff." (2 employees in the unit).

**0099-77-R:** Sheet Metal Workers' International Association Local Union #30 (Applicant) v. Rapid Refrigeration Mftg. Company Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (36 employees in the unit).

**0101-77-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Kemso Canada Ltd. (Respondent).

Unit: "all insulation mechanics and insulation mechanics' apprentices employed by the respondent in the district of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to the foregoing*).

**0104-77-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. R D Holiday Renovations (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except nonworking foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**0111-77-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Lindsay (Respondent).

Unit: "all employees of the Town of Lindsay under the jurisdiction of the Lindsay Recreation Commission save and except the superintendent, persons above the rank of superintendent, office staff, persons hired for the school vacation period, and those employees covered by a subsisting collective agreement with Canadian Union of Public Employees and its Local No. 855." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**0117-77-R:** Pattern Makers League of North America (Applicant) v. Atlas Pattern Works Ltd. (Respondent).

Unit: "all Pattern Makers and Apprentices employed by the Respondent in the City of Windsor, save and except foremen and persons above the rank of foreman." (14 employees in the unit).

**0118-77-R:** Pattern Makers League of North America (Applicant) v. Industrial Models Limited (Respondent).

Unit: "all Pattern Makers and Apprentices employed by the Respondent in the City of Windsor, save and except foremen and persons above the rank of foreman." (11 employees in the unit).

**0119-77-R:** United Steelworkers of America (Applicant) v. Murphy Brothers Limited (Respondent).

Unit: "all employees of the respondent working in the City of Hamilton, save and except foremen, Assistant Manager, persons above the rank of foreman and Assistant Manager, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during a school vacation period." (31 employees in the unit). (*Having regard to the agreement of the parties*).

**0121-77-R:** United Steelworkers of America (Applicant) v. Seneca Wire of Canada Limited (Respondent).

Unit #1: "all employees of the respondent at Richmond Hill, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week." (19 employees in the unit).

Unit #2: "all employees of the respondent at Richmond Hill, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office and sales staff." (3 employees in the unit).

**0133-77-R:** Millwrights' and Machine Erectors Local Union 2309, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Northland Plumbing & Heating Limited (Respondent).

Unit: "all millwrights and millwrights' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**0155-77-T:** United Steelworkers of America (Applicant) v. Aclo Compounders Ltd. (Respondent).

Unit: "all employees of the respondent in Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (37 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision [1977] OLRB Rep. May*).

**0156-77-R:** The Carpenters District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Acme Building and Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

**0157-77-R:** The Carpenters District Council of Toronto and Vicinity on behalf of Local 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. K. H. Preston Construction (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**0160-77-R:** Sheet Metal Workers' International Association Local Union #285 (Applicant) v. Blumark Heating Company (Respondent).

Unit: "all sheet metal workers and sheet metal apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquering and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and person above the rank of non-working foreman." (2 employees in the unit).

**0164-77-R:** The United Brotherhood of Carpenters & Joiners of America Local 2466 (Applicant) v. Anthony Beaulieu, Contractor (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Renfrew, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**0165-77-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. R. J. Dupuis Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**0166-77-R:** Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. County Electric (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*Having regard to the foregoing*).

**0167-77-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Acme Building and Construction Limited (Respondent).

Unit: "all construction labours in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

**0168-77-R:** United Textile Workers of America (Applicant) v. Collie Woollen Mills Limited, Perth Division (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Perth, save and except foremen, persons above the rank of foreman and office staff." (14 employees in the unit).

**0172-77-R:** Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Code 1 Investments Incorporated (Respondent).



Unit: "all truck drivers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario." (10 employees in the unit).

**0177-77-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. National Grocers Company Limited (Respondent).

Unit: "all cash and carry employees of the respondent in the Township of Gloucester, save and except assistant managers, persons above the rank of assistant manager and employees covered by a subsisting collective agreement between the applicant and the respondent." (13 employees in the unit). (*Having regard to the agreement of the parties*).

**0180-77-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Tito Construction Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**0184-77-R:** Labourers' International Union of North America, Local 1036 (Applicant) v. Sparkguard Industries Limited (Respondent).

Unit: "all employees of the respondent employed in Sault Ste. Marie, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (15 employees in the unit). (*Having regard to the agreement of the parties*).

**0188-77-R:** Hotel and Club Employees' Union, Local 299, Toronto Ontario affiliated with the Hotel and Restaurant Employees' and Bartenders' International Union (Applicant) v. Ramada Inn – Toronto Downtown (Respondent).

Unit: "all employees of the Respondent at the Ramada Inn – Toronto Downtown in the Municipality of Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office and sales staff, security staff, persons employed for not less than 24 hours per week and students employed during the school vacation period." (11 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision [1977] OLRB Rep. May*).

**0194-77-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Ray Peterson Construction (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foremen." (7 employees in the unit).

**0199-77-R:** Service Employees Union, Local 204, Affiliated with the A.F. of L., C.I.O., C.L.C., (Applicant) v. The Gladys Glen Ltd. (Respondent).

Unit #1: “all employees of the Respondent at Mississauga, Ontario save and except Registered nurses, physiotherapists, supervisors (including the housekeeping and maintenance supervisor), persons above the rank of supervisor, office staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week.” (35 employees in the unit). *(Having regard to the agreement of the parties).*

Unit #2: “all employees of the respondent at Mississauga, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except registered nurses, physiotherapists, supervisors (including the housekeeping and maintenance supervisor), persons above the rank of supervisor and office staff.” (23 employees in the unit). *(Having regard to the agreement of the parties).*

**0203-77-R:** International Brotherhood of Electrical Workers Local Union 105 (Applicant) v. Water-down Electric (Respondent).

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

**0205-77-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Danhei Construction Limited (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foremen.” (2 employees in the unit).

**0208-77-R:** Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. The Gladys Glen Ltd. (Respondent).

Unit #1: “all registered nurses, graduate nurses and undergraduate nurses employed by the Respondent at Mississauga, save and except Nursing director, supervisors, persons above the rank of supervisor and persons employed for 24 hours or fewer per week and students employed during the school vacation period.” (2 employees in the unit). *(Having regard to the agreement of the parties).*

Unit #2: “all registered nurses, graduate nurses and undergraduate nurses employed by the Respondent at Mississauga, for not more than 24 hours per week and students employed during the school vacation period save and except Nursing director, supervisors and persons above the rank of supervisor.” (8 employees in the unit). *(Having regard to the agreement of the parties).*

**0214-77-R:** Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Cities Service Chemicals, Ltd. Columbian Division (Respondent) v. International Union of Operating Engineers, Local 772, C.L.C., A.F.L., C.I.O. (Intervener).

Unit: “all employees of the respondent at Hamilton, Ontario save and except foremen, those above the rank of foreman, office and sales staff and students employed during the school vacation period.” (67 employees in the unit). *(Having regard to the agreement of the parties).*

**0220-77-R:** United Steelworkers of America (Applicant) v. Cleveland-CAE Metal Abrasive Limited (Respondent).

Unit: "all employees of the respondent at Welland, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, technicians employed in the metallurgy lab and professional engineers, and persons regularly employed for not more than twenty-four hours per week." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**0221-77-R:** United Steelworkers of America (Applicant) v. Jet Welding and Ornamental Iron Works Inc. (Respondent).

Unit "all employees of the respondent at Thunder Bay, save and except foremen, persons above the rank of foreman, office and sales staff." (4 employees in the unit).

**0232-77-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Local 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233 (Applicant) v. Beaver Lumber Company Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman," (2 employees in the unit).

**0240-77-R:** Canadian Union of Public Employees (Applicant) v. The Board of Education for the City of London (Respondent).

Unit #1: "all teacher's aides regularly scheduled to work not less than 35 hours per week by the respondent at London, Ontario, save and except consultants, persons above the rank of consultant and employees covered by existing collective agreements."

Unit #2: "all teacher's aides regularly scheduled to work more than 24 hours per week but less than 35 hours per week by the respondent at London, Ontario, save and except consultants, persons above the rank of consultant and employees covered by existing collective agreements."

Unit #3: "all teacher's aides regularly scheduled to work not more than 24 hours per week by the respondent at London, Ontario, save and except consultants, persons above the rank of consultant and employees covered by existing collective agreements." (46 employees in the 3 units).

**0247-77-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Environmental Technical Services Inc. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*Having regard to the foregoing*).

**0248-77-R:** Service Employees Union, Local 204 (Applicant) v. Dufferin Area Hospital (Respondent).

Unit: "all employees of Dufferin Area Hospital, Orangeville, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except professional medical staff, graduate nurses, undergraduate nurses, technical personnel, supervisors, person above the rank of supervisor, office and clerical staff and persons covered by



subsisting collective agreements.” (51 employees in the unit). (*Having regard to the agreement of the parties*).

**0251-77-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Bristol-Myers Pharmaceutical Group Division of Bristol-Myers Canada Limited (Respondent).

Unit: “all employees of the respondent in Belleville, Ontario, save and except foremen, persons above the rank of foreman, sales staff, and office, clerical and technical employees.” (159 employees in the unit). (*Having regard to the agreement of the parties*).

**0256-77-R:** Canadian Food & Allied Workers Union Local 633 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Ponderosa Steak House Distribution Centre (Respondent).

Unit: “all employees of the respondent engaged at its meat processing operation at its plant at Brampton, Ontario, save and except foremen, supervisors, persons above the ranks of foreman and supervisor, office, clerical and sales staff, maintenance supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods.” (27 employees in the unit). (*Having regard to the agreement of the parties*).

**0267-77-R:** The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Traugott Construction Ltd. (Respondent).

Unit: “all carpenters and carpenters” apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville in Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**0275-77-R:** Labourers’ International Union of North America, Local 506 (Applicant) v. Traugott Construction Limited (Respondent).

Unit: “all construction labourers employed by the respondent on building projects in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

**0295-77-R:** Christian Labour Association of Canada (Applicant) v. Saccucci Forming Company (Respondent).

Unit: “all construction labourers in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Having regard to the foregoing*).

**0305-77-R:** The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 2480, 2482, 3227, 1747 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. W. C. D. Forming Co. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. (9 employees in the unit).

**0306-77-R:** Labourers' International Union of North America, Local 183 (Applicant) v. McClintock Charnwood Homes Limited and McClintock Bridlewood Homes Limited (Respondent).

Unit: "all construction labourers employed by the respondent on residential construction in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*clarity note – see Report of full decision [1977] OLRB Rep. May*).

**0312-77-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Ontario Formwork (Central) Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

### Applications Certified Subsequent to Pre-Hearing Vote

**2156-76-R:** Canadian Chemical Workers' Union (Applicant) v. Beachville Lime Limited (Respondent) v. International Chemical Workers Union, Local 564 (Intervener).

Unit: "all employees on the payroll of the Company at its Beachville plant save and except foremen, persons above the rank of foreman and office, stores supervisory and laboratory staff." (82 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	83
Number of persons who cast ballots	79
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	50
Number of ballots marked in favour of intervener	25

**2207-76-R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Victoria Hospital Corporation (Respondent) v. Ontario Public Service Employees Union (Intervener).

Unit: "all employees of the respondent at London, Ontario regularly employed for not more than 24 hours per week, students employed during the school vacation periods, persons engaged as temporary replacements for periods not exceeding six months, persons engaged to work on special projects for periods of not more than six months and persons engaged intermittently on call for periods not exceeding one hundred and four hours during any calendar month save and except professional medical staff, veterinarians, graduate nurses, undergraduate nurses, Registered Nursing Assistants, graduate pharmacists, undergraduate pharmacists, graduate dietitians, undergraduate and student dietitians, persons engaged in research work, Social Workers, technical personnel, chief engineer, assistant chief engineer, residence director, supervisors, foreman, persons above the rank of supervisor or foreman, office and clerical staff, watchmen, security guards, students engaged in a cooperative

program between the Employer and an educational institution for periods not exceeding one month, Safety Officer, Physiotherapy student interns, occupational Therapy student interns, dietetic interns, pharmacy interns, persons covered by subsisting bargaining relationships and part-time personnel regularly employed for not more than 24 hours per week in classifications otherwise included in such bargaining relationships with ONA, Local 100, OPEIU, Local 468, and OPSEU respectively.” (239 employees in the unit). (*Having regard to the agreement of the parties*) (clarity note – see Report of full decision [1977] OLRB Rep. May).

Number of names of persons on revised voters’ list	176
Number of persons who cast ballots	67
Number of ballots excluding segregated ballots cast by persons whose names appear on voters’ list	64
Number of segregated ballots cast by persons whose names do not appear on voters’ list	3
Number of ballots marked in favour of applicant	67

**0036-77-R:** Bakery & Confectionery Workers’ International Union of America, Local 264 (Applicant) v. W. & H. Voortman Limited (Respondent) v. Christian Trade Unions of Canada (Intervener).

Unit: “all its employees save and except salesmen and office staff, non-working foremen and persons above the rank of non-working foreman, and truck drivers.” (119 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list	127
Number of persons who cast ballots	111
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	91
Number of ballots marked in favour of intervener	18

**0113-77-R:** Canadian Chemical Workers Union (Applicant) v. The Continental Group of Canada Limited, Plant Products, Plant 533 – London (Respondent) v. International Chemical Workers Union, Local 186 (Intervener #1) v. International Chemical Workers and its Local 898 (Intervener #2).

Unit: “all those employees at its London Plant No. 533 save and except Production Supervisors, Department Supervisors and those above the rank of Department Supervisors, Sales and Office Staff.” (134 employees in the unit).

Number of names of persons on lists as originally prepared by employer	108
Number of persons who cast ballots	91
Ballots segregated and not counted	1
Number of ballots marked in favour of applicant	86
Number of ballots marked in favour of intervener #1	4

### Applications Certified Subsequent to Post-Hearing Vote

**1923-76-R:** Retail, Wholesale and Department Store Union, AFL: C10:CLC (Applicant) v. G. Tamlyn Limited (Respondent).

Unit: “all employees of the respondent at its Retail Drug Stores within the Regional Municipality of Ottawa-Carleton regularly employed for not more than twenty-four (24) hours per week, save and except Merchandise Managers, those above the rank of Merchandise Manager, office and clerical staff,



graduate pharmacists, pharmacist internes, undergraduate pharmacists, pharmacy technicians and persons covered by a subsisting Collective Agreement between the applicant and the respondent." (70 employees in the unit).

Number of names of persons on revised voters' list		53
Number of persons who cast ballots	40	
Ballots segregated and not counted	3	
Number of ballots marked in favour of applicant	20	
Number of ballots marked against applicant	17	

**1965-76-R:** International Brotherhood of Electrical Workers Local Union 586 – Ottawa (Applicant) v. Noranda Metal Industries Limited Special Metals Division (Respondent) v. Group of Employees (Intervener).

Unit: "all employees at Noranda Metal Industries Limited, Special Metals Division, 425 McCartney St., Arnprior, in the County of Renfrew, Ontario, save and except foremen and supervisors, persons above the rank of foreman and supervisor, office and sales staff, students employed during the vacation periods or on a cooperative training program." (122 employees in the unit).

Number of names of persons on list as originally prepared by employer		116
Number of persons who cast ballots	110	
Number of ballots marked in favour of applicant	62	
Number of ballots marked against applicant	48	

## APPLICATIONS FOR CERTIFICATION DISMISSED

### No Vote Conducted

**2209-76-R:** United Brotherhood of Carpenters Joiners of America, Local 2486 (Applicant) v. Mancar Builders Inc. (Respondent). (3 employees).

**0095-77-R:** The International Union of Bricklayers & Allied Craftsmen Local #10 (Applicant) v. Structural Formwork Limited (Respondent). (2 employees).

**0138-77-R:** The International Union of Bricklayers & Allied Craftsmen Local #10 (Applicant) v. Stewart & Hinan (Respondent). (2 employees).

**0143-77-R:** The United Brotherhood of Carpenters & Joiners of America Local 2466 (Applicant) v. W. Rourke Limited (Respondent). (2 employees).

**0193-77-T:** Labourers' International Union of North America, Local 183 (Applicant) v. Mor-Alice Construction Limited (Respondent) v. Group of Employees (Objectors). (19 employees).

**0239-77-R:** Chatham Construction Workers Association Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Roscoe Electric (Windsor) Ltd. (Respondent) v. International Brotherhood of Electrical Workers Local 773 (Intervener). (2 employees).

**0300-77-R:** Labourers International Union of North America Local 837 (Applicant) v. Moir Construction Company Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen, persons above the rank of non-working foreman and construction labourers covered by a collective agreement dated June 14, 1965 between The Welland Canal Twinning Project Contractors' Association and The Welland Canal Construction Council." (5 employees in the unit).

### **Certification Dismissed Subsequent to Pre-Hearing Vote**

**2199-76-R:** Upholsterers International Union of North America A/F/L/C/I/C (Applicant) v. Troisier & Company Ltd. (Respondent).

Voting Constituency: "All employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foremen, office and clerical staff, sales staff and students employed during the school vacation period." (71 employees).

Number of names of persons on list as originally prepared by employer		71
Number of persons who cast ballots	70	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	25	
Number of ballots marked against applicant	44	

**0015-77-R:** Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers, Local 1000, Affiliated with the Internatioanl Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Gilbey Canada Limited (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener).

Voting Constituency: "All stationary engineers employed by the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except Chief Stationary Engineer and persons above the rank of Chief Stationary Engineer." (6 employees).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant	1	
number of ballots marked in favour of intervener	4	

### **Certification Dismissed Subsequent to Post-Hearing Vote**

**0241-76-R:** Labourers' International Union of North America, Local Union #493 (Applicant) v. Winson Construction Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all construction labourers in the employ of the respondent within a twenty mile radius of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Number of names of persons on revised voters' list		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	6	

**1898-76-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 800 (Applicant) v. Arcan Plumbing & Heating Ltd. (Respondent).

Unit: "all plumbers and plumbers' apprentices, steamfitters, and steamfitters' apprentices, gasfitters and gasfitters' apprentices, in the employ of the respondent within a fifty mile radius of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	2	

**1977-76-R:** The Ontario Social Service Workers (Applicant) v. The Children's Aid Society of the County of Essex (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the Society in the County of Essex save and except Assistant Executive Director and Business Administrator, those above the rank of Assistant Executive Director and Business Administrator, Social Work Consultants, Personnel Director, Residence Coordinator, Book-keeping Supervisor, secretary to the Executive Director, secretary to the Assistant Executive Director, secretary to the Business Administrator, and students employed during the school vacation period." (95 employees in the unit).

Number of names of persons on revised voters' list		86
Number of persons who cast ballots	77	
Number of ballots marked in favour of applicant	36	
Number of ballots marked against applicant	41	

**2013-76-R:** Association of Commercial and Technical Employees, Local 1704, C.L.C. (Applicant) v. The Berlitz Schools of Languages of Canada Ltd. (Respondent) v.. Group of Employees (Objectors).

Unit #2: "all language instructors regularly employed by the respondent in Metropolitan Toronto for not more than 24 hours per week save and except the Director and the Secretary to the Director." (20 employees in the unit).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	14	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	8	

*(Bargaining Unit #1. – See Bargaining Units Certified – No Vote Conducted).*

**2060-76-R:** Hotel & Restaurant Employees & Bartenders Internatioanl Union Local 197 (Applicant) v. Pig & Whistle Inn Limited (Respondent).

Unit: "all full-time and part-time, male and female, bartenders, tapmen, bar-boys, waiters, improvers and foremen in the employ of the respondent at Burlington, Ontario," (28 employees in the unit).



Number of names of persons on list as originally prepared by employer		28
Number of persons who cast ballots		25
Number of ballots marked in favour of applicant	4	
Number of ballots marked against applicant	21	

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**0507-75-R:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 3227, 3233 (Applicant) v. The Municipality of Metropolitan Toronto Parks Department (Respondent) v. The Canadian Union of Public Employees, Toronto Civic Employees Union, Local Union No. 43 (Intervener). (13 employees).

**1852-76-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Timberline Wood Products (Windsor) Limited (Respondent) v. Employee (Objector). ( employees).

**2194-76-R:** Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Maple Earthmoving Co. (Respondent). (11 employees).

**0091-77-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. J. A. MacDonald London Limited (Respondent). (7 employees).

**0106-77-R:** Service Employees Union, Local 478 A.F. of L., C.I.O., C.L.C. (Applicant) v. Cochrane Nursing Homes Limited (Respondent). (18 employees).

**0139-77-R:** Brewery, Soft Drink, Distillery, Distributors & Miscellaneous Workers, Local 1000, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Levi Strauss of Canada Inc. (Respondent) v. Amalgamated Clothing and Textile Workers Union (Intervener). (120 employees).

**0158-77-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Sheaffer-Townsend Limited (Respondent). (2 employees).

**0159-77-R:** Labourers' Internatioanl Union of North America, Local 506 (Applicant) v. Ellis-Don Limited (Respondent) v. Local 598 of the Operative Plasterers and Cement Masons International Association of the United States and Canada (Intervener) v. The General Contractors' Section of The Toronto Construction Association (Intervener). (3 employees).

**0173-77-R:** Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. 227223 Earth Moving Limited (Respondent). (11 employees).

**0218-77-R:** Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 124, Ottawa-Hull (Applicant) v. Ormesher Construction Ltd. (Respondent). (10 employees).

**0219-77-R:** Labourers' International Union of North America, Local 491 (Applicant) v. Genan Construction Limited (Respondent). (8 employees).

**0229-77-R:** Service Employees Union, Local 478 A.F. of L., C.I.O., CL.C. (Applicant) v. Cochrane Nursing Home Limited (Respondent). (19 employees).

**0238-77-R:** Labourers' International Union of North America, Local 247 (Applicant) v. Bertoia Lathing Company Limited (Respondent). (2 employees).

**0245-77-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Greenwin Property Management (Respondent). (82 employees).

**0298-77R:** Labourers' International Union of North America, Local 506 (Applicant) v. Leader Structures (Toronto) Ltd. (Respondent). (3 employees).

## **APPLICATIONS FOR DECLARATION TERMINATION BARGAINING RIGHTS**

**2196-76-R:** Mr. André LaBonté (Applicant) v. Local Union 773 of the International Brotherhood of Electrical Workers (Respondent). (8 employees). (*Dismissed*).

**0032-77-R:** William A. Clayton (Applicant) v. Sheet Metal Workers' International Association, Local Union No. 562 (Respondent) v. Thompson Sheet Metal Ltd. (Intervener). (4 employees). (*Dismissed*).

**0123-77-R:** Tas Alarm and Security Services (Applicant) v. Local Union 636 International Brotherhood of Electrical Workers (Respondent). (2 employees). (*Granted*).

**0176-77-R:** Willson Office Specialty Ltd. (Applicant) v. Teamsters, Chauffeurs, Warehousemen & Helpers, Union Local 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent). (10 employees). (*Granted*).

**0204-77-R:** Tudor Glen Homes (Applicant) v. Local 183 Labourers' International Union of North America (Respondent). (15 employees). (*Withdrawn*).

**0211-77-R:** Patrick B. Windross (Applicant) v. Oil, Chemical and Atomic Workers International Union Local 9-599 (Respondent). (17 employees). (*Withdrawn*).

**0237-77-R:** Pietro Russo, Frank Canino, Michele Rapallo, Anton Jahan, Eugenio Maiolini, Victor Giovannoni, Nicola Giannantino Nello Fuoco (Applicant) v. International Brotherhood of Teamsters Local 230 (Respondent) v. Ontario Paving Co. (Intervener). (8 employees). (*Withdrawn*).

## APPLICATION FOR DECLARATION OF SUCCESSOR STATUS

**2005-76-R:** Lumber and Sawmill Workers Union, Local 2693, of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Northern Wood Preservers Limited (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 2827 (Trade Union) v. Group of Employees (Objectors). (*Dismissed*).

**Unit:** "All employees engaged in the plant and yard of the Company with the exception of the office staff, superintendents, persons above the rank of subforemen, any party who has the right to hire or layoff or discharge men, and engineers and hoisting men belonging to the Operating Engineers' Union."

Number of names of persons on list as originally prepared by employer		321
Number of persons who cast ballots	252	
Number of spoiled ballots	4	
Number of ballots marked in favour of applicant	99	
Number of ballots marked in favour of Predecessor Trade Union	149	

## APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

**1918-76-U:** Canadian Pittsburgh Industries, A Division of PPG Industries Canada Ltd. (Applicant) v. Oil, Chemical, and Atomic Workers International Union Local 9-690 (Respondent). (*Withdrawn*).

**1919-76-U:** Canadian Pittsburgh Industries, A Division of PPG Industries Canada Ltd. (Applicant) v. Kenneth Pratt and Don Rundle (Respondent). (*Withdrawn*).

**1920-76-U:** Canadian Pittsburgh Industries, A Division of PPG Industries Canada Ltd. (Applicant) v. Kenneth Pratt, Don Rundle and Others as on attached list (Respondents). (*Withdrawn*).

**2065-76-U:** The Ontario-Minnesota Pulp and Paper Company Ltd. (Applicant) v. International Association of Machinists, Aerospace Workers, Lodge 771, and Nick Wihnan, Cecil Mosbeck, Michael R. Parnell, Donald Roth, Charles V. Alberts, et al (Respondents). (*Granted*).

**0162-77-U:** Bechtel Canada Ltd. (Applicant) v. The International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 700, John Anjema, et al (See Schedule "A" attached hereto), Don Stewart, et al, (See Schedule "B" attached hereto) (Respondents). (*Dismissed*)

**0190-77-U:** Foster Wheeler Limited (Applicant) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, B. Blackwell, S. Adair et al (See Schedules "A" and "B" attached hereto) (Respondents). (*Withdrawn*)

**0201-77-U:** Tudor Glen Homes (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent). (*Dismissed*):

**0265-77-U:** The Lummus Company Canada Limited (Applicant) v. Don Paquette et al (Respondents). (*Withdrawn*).



**0289-77-U:** Bestpipe Limited (Applicant) v. Those Persons Appearing in Schedule "B" Hereto (Respondents). (*Withdrawn*).

**0290-77-U:** Bestpipe Limited (Applicant) v. United Glass and Ceramic Workers of North America and its Local 211 (Respondent). (*Withdrawn*).

**0327-77-U:** Operative Plasterers' & Cement Masons' International Association, Local 702 (Applicant) v. Labourers' International Union of North America, Local 506 (Respondent) v. Mollenhauer Limited (Intervener #1) v. A.N. Shaw Restorations Limited (Intervener #2). (*Dismissed*).

## APPLICATIONS FOR CONSENT TO PROSECUTE

**2177-76-U:** Labourers' International Union of North America, Local 183 (Applicant) v. Mount Citadel Limited and R. Watson (Respondents). (*Withdrawn*).

**0056-77-U:** Labourers' International Union of North America, Local 183 (Applicant) v. A.C. Khan Janitorial Services Ltd., Ackbar Khan, Raymond Martin, Walter Diabacco and Beverley Gauthier (Respondent). (*Withdrawn*).

**0150-77-U:** Labourers' International Union of North America, Local 527 (Applicant) v. R.J. Nicol Construction (1975) Limited, Robert Nicol and Martin Lapinette (Respondents). (*Withdrawn*).

**0257-77-U:** Canadian Union of Public Employees and its Local 895 (Applicant) v. Hanmer Bus Line Inc. (Respondent). (*Withdrawn*).

## COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

**1271-76-U:** Boot and Shoe Workers Union (Complainant) v. Hillsdale Nursing Home (Respondent). (*Withdrawn*).

**1832-76-U:** Hotel and Restaurant Employees and Bartenders International Union, Local 604 (Complainant) v. Keith Brown, Esq. (Respondent). (*Terminated*).

**2053-76-U:** Canadian Union of Public Employees and its Local 1797 (Complainant) v. The Catholic Children's Aid Society of Hamilton-Wentworth (Respondent). (*Withdrawn*).

**2077-76-U:** Lionel Matte (Complainant) v. Penvidic Contracting (1971) Ltd. and The International Union of Operating Engineers, Local 793 (Respondents). (*Withdrawn*).

**2078-76-U:** Gary Fraser (Complainant) v. Penvidic Contracting (1971) Ltd. and The International Union of Operating Engineers, Local 793 (Respondents). (*Withdrawn*).

**2079-76-U:** Henry Goeree (Complainant) v. Penvidic Contracting (1971) Ltd. and The International Union of Operating Engineers, Local 793 (Respondents). (*Withdrawn*).

**2080-76-U:** U. Chop Mok (Complainant) v. Toronto General Hospital, and Canadian Union of Public Employees and its Local #2001 (Respondents). (*Dismissed*).

**2175-76-U:** Canadian Chemical Workers Union (Complainant) v. Drug Trading Company Limited (Respondent). (*Withdrawn*).

**2176-76-U:** Labourers' International Union of North America, Local 183 (Complainant) v. Mount Citadel Limited and R. Watson (Respondents). (*Withdrawn*).

**2189-76-U:** Maria Candida Arcanjo (Complainant) v. Amalgamated Clothing Workers of America (Respondent). (*Dismissed*).

**0049-77-U:** International Woodworkers of America (Complainant) v. Domtar Construction Materials Limited (Respondent). (*Withdrawn*).

**0052-77-U:** Toronto Typographical Union, No. 91 (Complainant) v. CCH Canadian Limited (Respondent). (*Withdrawn*).

**0057-77-U:** Labourers' International Union of North America, Local 183 (Complainant) v. A.C. Khan Janitorial Services Ltd., Ackbar Khan, Raymond Martin, Walter Diabacco and Beverley Gauthier (Respondent). (*Withdrawn*).

**0105-77-U:** Nettie Valigrosky (Complainant) v. Bakery and Confectionery Workers' International Union of America, Local 426 (Respondent). (*Withdrawn*).

**0141-77-U:** United Plant Guard Workers, Local 1962 (Complainant) v. Greater York Property Management Limited (Respondent). (*Withdrawn*).

**0149-77-U:** Labourers' International Union of North America, Local 527 (Complainant) v. R.J. Nicol Construction (1975) Limited, Robert Nicol and Martin Lapinette (Respondents). (*Withdrawn*).

**0151-77-U:** Service Employees Union, Local 204 (Complainant) v. Tyndall Nursing Home Limited (Respondent). (*Withdrawn*).

**0152-77-U:** United Garment Workers of America (Complainant) v. Buckeye Peerless Textile Products Co. Limited (Respondent). (*Dismissed*).

**0174-77-U:** Canadian Union of Public Employees and its Local #2040 (Complainant) v. Newmarket Extended Care and Convalescent Centre (Respondent). (*Withdrawn*).

**0183-77-U:** Canadian Union of Public Employees (Complainant) v. Guelph Public Library Board (Respondent). (*Dismissed*).

**0187-77-U:** Canadian Union of Public Employees, Local 109 (Complainant) v. Corporation of the City of Kingston (Respondent). (*Withdrawn*).

**0191-77-U:** Brewery, Soft Drink, Distillery, Distributors & Miscellaneous Workers, Local 1000 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Hamilton Radiator Service Ltd. (Respondent). (*Withdrawn*).

**0200-77-U:** Mary Hamilton, M. Jane Greenhalgh, Patricia Christine Rowe, Ida Chan, Fernanda Colletto, Barbara J. Bell, Beverly Ann Hollo, Edith Kalinovich, Margaret E. Kovacs, and Nancy McLeod (Complainants) v. Ontario Public Service Employees Union (Respondent). (*Withdrawn*).

**0224-77-U:** United Electrical, Radio and Machine Workers of America (Complainant) v. Express Plastic Containers Limited (Respondent). (*Withdrawn*).

**0228-77-U:** Ontario Nurses' Association (Complainant) v. Bestview Lodges, Nursing Homes (Respondent). (*Withdrawn*).

**0236-77-U:** John H. Cheeseman (Complainant) v. Leo O'Rourke, President Local 113, United Rubber, Cork, Linoleum and Plastic Workers of America (Respondent). (*Withdrawn*).

**0258-77-U:** Canadian Union of Public Employees and its Local 895 (Complainant) v. Hanmer Bus Line Inc. (Respondent). (*Withdrawn*).

**0284-77-U:** The Canadian Union of Public Employees and its Local 241 (Complainant) v. The Corporation of the Town of Fergus (Respondent). (*Withdrawn*).

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**0054-77-M:** London Hospital Linen Service Incorporated (Employer) v. Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351 (Union). (*Granted*).

**0313-77-U:** Wilson's Truck Lines Limited (Employer) v. Canadian Union of Drivers and General Workers (Trade Union). (*Granted*).

## **APPLICATION UNDER SECTION 55**

**2087-76-R:** International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Ketter Electrical Limited and Practical Electric Ltd. (Respondents) v. Electrical Contractors Association of Toronto (Intervener). (*Withdrawn*).

## **APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)**

**0888-75-M:** Ontario Public Service Employees' Union (Applicant) v. The Board of Governors of Algonquin College, et al (Respondents). (*Granted*). (*College Collective Bargaining Act – Section 82*).



**0621-76-M:** Canadian Union of Public Employees, Local 791 (Applicant) v. The Corporation of the City of Kitchener (Respondent). (*Terminated*).

**1429-76-M:** The Corporation of the City of Sudbury (Applicant) v. Canadian Union of Public Employees, Local #1662 (Respondent #1) v. Canadian Union of Public Employees, Local #207, C.L.C. (Respondent #2). (*Terminated*).

**0064-77-M:** Local 1080, Canadian Union of Public Employees (Clerical Unit) (Applicant) v. Humber Memorial Hospital Association (Respondent). (*Withdrawn*).

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**2134-76-M:** Labourers' International Union of North America, Local 527 (Applicant) v. Sandrin Precast Limited (Respondent). (*Withdrawn*).

**2191-76-M:** International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Electrical Contractors' Association of Toronto, Practical Electric Ltd. and Ketter Electric Limited (Respondents). (*Withdrawn*).

**0066-77-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Schwenger Construction Ltd. (Respondent). (*Granted*).

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**0109-77-M:** Labourers' International Union of North America Local 506 (Applicant) v. The General Contractors' Section of the Toronto Construction Association and Colt Contracting Company Limited (Respondents). (*Terminated*).

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**0309-77-M:** Labourers' International of North America, Local 1081 (Applicant) v. Ball Brothers Limited (Respondent). (*Withdrawn*).

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**1415-76-U:** Stephen T. Wills (Complainant) v. Seneca College of Applied Arts and Technology (Respondent). (*Colleges Collective Bargaining Act*). (*Request Denied*).

# ONTARIO LABOUR RELATIONS BOARD

## Monthly Case Breakdown—Disposition and Comparison May 1977

Case Type	Applications Received		Total Disposed of		Disposed of During: May-77			Current Pending	Disposed of Last Month		
	During: May-77	Last Month	During: May-77	Last Month	Granted	Dismissed	Withdrawn		Granted	Dismissed	Withdrawn Pending
Certification	74	112	104	63	76	12	16	205	43	11	9 235
Termination	6	9	6	11	2	1	3	17	8	2	1 17
Section 1(4)	1	1	-	-	-	-	-	8	-	-	- 7
*Successor Status	3	2	2	19	-	1	1	13	18	-	1 12
Accreditation	-	-	1	-	1	-	-	7	-	-	- 8
Unlawful Strike	1	-	-	-	-	-	-	31	-	-	- 30
Unlawful Lockout	1	-	-	-	-	-	-	3	-	-	- 2
Prosecutions	11	9	4	1	-	-	4	113	-	1	- 106
Section 79	36	43	28	31	-	3	25	173	4	5	22 165
**Declaration of Unlawful Strike or Lockout	11	9	12	5	1	4	7	61	-	1	4 62
***Misc.	22	27	18	15	4	1	13	175	5	4	6 171
Bill 139	-	-	-	-	-	-	-	-	-	-	- -
TOTAL	166	212	175	145	84	22	69	806	78	24	43 815

\*Sections 54 and 55 are consolidated.

\*\*Sections 123, 82, 83 and 63 are consolidated.

\*\*\*Sections 37, 39, 44(3), 76, 81, 95(2), 96 and 112(a) are consolidated.

NOTE: The Pending figures found directly beside the section "Disposed of During: " are a consolidation of those cases received during the month and pending into the next, and the pending cases from the previous month.







Labour  
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# Decisions July 77

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**Arbitration – Section 112a – Whether individual employer member of accredited employers' association may carry forward a grievance.**

**BEFORE:** E. Norris Davis, Vice-Chairman, and Board Members E. Boyer and W. H. Wightman.

**APPEARANCES:** *R. A. Werry and B. Eaton for the applicant; S. Wahl and R. Carol for the respondent; J. P. Wilson for the intervener.*

**DECISION OF THE BOARD: July 29, 1977**

1. This is an application under section 112a of The Labour Relations Act seeking a final and binding determination to a dispute under an existing collective agreement. At the hearing, with the agreement of the parties, the Board decided to limit representations at this time to the issue of the applicant's status to bring on the current application.

2. On January 9, 1975, this Board issued a certificate of accreditation to the Electrical Contractors Association of Toronto under which the Association became the bargaining agent for a number of employers, including the applicant. A collective agreement was subsequently entered into with the respondent and the Association effective from May 1, 1975 to April 30, 1977. Section 3 of the Agreement provides:

"This agreement is to be signed by representatives of the Electrical Contractors Association of Toronto on behalf of Electrical Contractors who are members of the Association."

The applicant is a member of the Association.

3. Section 3 of the Agreement also provides:

"This Agreement may be signed by individual contractors who are not members of the Electrical Contractors Association."

In our view, nothing in this case turns on this latter part of section 3 of the Agreement.

4. Counsel for the respondent argues that section 112a is available to a "party to a collective agreement" and that the applicant is a member of an accredited employers' organization, the Electrical Association of Toronto, which is the sole other party to the collective agreement effective from May 1, 1975 with the respondent. The respondent further takes the position that you cannot have both an accredited employers' organization and a member employer both as "parties to a collective agreement" and refers the Board to sections 116(1), 117(2) and (3), 118(6)(b) and 119(1) and relies on *International Association of Bridge, Structural & Ornamental Workers Local Union 700 and the Lummus Co. Canada Ltd*, Board File 1304-75-M, and on *Electrical Power Systems Construction*, [1976] OLRB Rep. Dec. 825.



5. Counsel for the applicant takes the position that access by an employer under circumstances such as the present is clearly contemplated by the Act and refers to section 117(2) of the Act. The applicant further urges that to do otherwise would militate against the general purpose of the legislation to stabilize labour relations by precluding, for instance, an application under section 123.

6. It is our view that where an accredited employers' organization, as here, has concluded a collective agreement as exclusive bargaining agent, it must accept the responsibility of enforcing the terms of that contract. The exclusive bargaining agent has no right to abandon any part of this responsibility in favour of some other designated person; nor do we have any difficulty in rationalizing this view with the right, under section 123(1), of permitting an individual employer, being a member of an accredited employers' organization, to bring on an application for a declaration of unlawful strike. In section 112a, the language of the legislature is clear that no one other than a "party to a collective agreement" can avail itself of the remedial avenue set out. In section 123(1) it is equally clear that the right to bring an application is conferred on a much broader group of entities, including "an interested person". See *Bechtel Canada Ltd.*, Board File No. 0162-77-U. In the instant case there is no doubt that the applicant is not a party to the agreement.

7. The applicant suggests there could be circumstances in which the Association as a whole would not want to process a grievance on behalf of an individual employer should have the right to carry the grievance forward.

8. Section 120 of the Act provides for the fair representation of employers represented by the accredited employers' organization. If, as the applicant submits, either the employers' organization or an individual employer in the unit represented may exercise the right (or the responsibility) of enforcing the collective agreement, then section 120 becomes meaningless and mere surplusage. Indeed, to accept the applicant's submission would be confusing a situation, as here, where the employers have appointed an exclusive bargaining agent which has entered into a collective agreement on their behalf, with a more fractionated situation where the parties might have bargained jointly but concluded a multiplicity of separate collective agreements.

9. Further, our decision in the instant case that the only proper party to bring an application under section 112a is the accredited employers' organization is consistent with the reasoning of the Board in the *Electrical Power Systems Construction Association* case, [1976] OLRB Rep. Dec. 825.

10. Accordingly, the application is dismissed for want of status by the applicant to carry the matter under section 112a.

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**0216-77-U** Retail, Wholesale and Department Store Union, AFL-CIO-CLC and Retail, Wholesale and Department Store Union, Local 461, (Applicant), v. **Humpty Dumpty Foods Limited**, (Respondent).

**Lockout – Whether plant closure to avoid collective agreement obligations is a lockout.**

**BEFORE:** Kevin M. Burkett, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

**APPEARANCES:** *Aubrey Golden, James Hayes, Hugh Buchanan and Don Collins for the applicant; F.R. von Veh, E. Rovet, John Fisher and R.N. Rafuse for the respondent.*

**DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER O. HODGES; July 11, 1977**

1. This is a complaint filed under section 83 of the Act alleging an unlawful lock-out. The complainant alleges that the respondent company (a producer and distributor of snack foods) locked out its employees within the meaning of section 1(1)(i) of The Labour Relations Act during the term of a subsisting collective agreement thereby violating Section 63 of the Act.

2. On April 28, 1977 the company announced to its London based employees that it was changing its distribution system in the London area and that commencing the following Monday, May 2, 1977, it would no longer operate out of a central warehouse on Highberry Avenue, London, hereinafter referred to as the May's warehouse, but rather would operate out of six single bin warehouses situated outside London (Centralia, Lucan, Burr, Aylmer, St. Thomas and Woodstock) to which individual driver/salesmen would be assigned on a permanent basis. The complainant union was certified pursuant to section 6(1a) of the Act on November 18, 1975. At that time, the parties were agreed on the scope of the bargaining unit (including its geographic boundaries) and this agreed bargaining unit now appears in the recognition clause of the collective agreement which they subsequently negotiated. That clause provides as follows:

“The Company recognizes the Union as the sole collective bargaining agent of all employees of the Company employed in the City of London, Ontario, save and except supervisors and persons above the rank of supervisor and temporary employees, provided however, that any such temporary employees, employed continuously for a period of more than the probationary period, shall be included in the bargaining unit.”

3. The employees covered by the collective agreement referred to above were told by the company on Friday, April 28 that if they wished to remain with the company they would be *individually* assigned to one of the six single bin warehouses and that although they were free to remain as union members they would no longer be covered by the terms of the collective agreement. The employees were told that the company would be moving its inventory etc. to the single bin locations over the weekend and commencing to operate from these locations immediately. Employees wishing to remain with the company were asked to

indicate their decision in this regard and those not wishing to relocate were told that the company would take inventory from their trucks (i.e. terminate their services). The employees were informed that the terms and conditions of employment which would apply to those accepting employment at the single bin locations were those applying to all driver/salesmen in Ontario other than those employed in Toronto. The subsisting collective agreement which had been concluded in March provided for terms and conditions identical to those enjoyed by the driver/salesmen operating in Toronto. In summary then, the employer announced that it was moving its warehouses to locations beyond the scope of the collective agreement it had negotiated just seven weeks before (but would be servicing the same customers as before) and advised its employees that it would continue their employment, but only on terms and conditions inferior to those in their collective agreement. The London based employees accepted relocation under protest. The instant application has been filed by the union in response to the actions of the company on April 28, 1977.

4. The evidence reveals a pattern of employer opposition to the trade union. In the initial certification proceeding a number of employees filed allegedly "voluntary" statements which also opposed the union. The Board unanimously found that these statements could not be regarded as a voluntary expression of the wishes of the employees and announced from the Bench that the statements were tainted by management interference. Moreover the evidence indicates that on January 9, 1976, only six weeks following the certification of the union as the *exclusive* bargaining agent for the named group of employees, the employer, without consulting the trade union, offered to the employees a \$1,000 "incentive bonus" to be paid on July 1, 1977 for the year commencing July 1, 1976. A formal certificate was issued to the union on February 12, 1976 and the union served notice to bargain on March 7, 1976. The parties met with a conciliation officer on July 16, and a "No Board" report was issued on June 23. The company requested mediation services and the parties met with a mediator on August 6, 1976. The company claimed at that meeting that the union did not represent its employees. Mr. Rafuse, the company spokesman, asked the mediator to speak with the 5 driver/salesmen who were present in the lobby. Mr. Peter Barrett, a driver/salesman with the company who went to the lobby of the Howard Johnston Motor Hotel on August 6 gave uncontradicted evidence that he "was told by management to get some fellows together and go down to the Howard Johnston and tell them that we don't want the union to represent us." The Board is satisfied that the company has engaged in a pattern of activity designed to interfere with the collective representation of its employees.

5. Following the mediation session of August 6, at which no progress was made towards achieving a collective agreement, the relationship between the company and the union entered a period of hiatus. The union, which was pressing for the same agreement as that negotiated between the company and the Teamsters Union covering its driver/salesmen in Toronto, admitted that it was "weak" at that time and did not attempt to pursue the matter. Subsequently, however, the employees of Humpty Dumpty visited the union office in November, 1976 and affirmed their support for the union. A legal strike was called on December 2, 1976.

6. The complainant union has a "Hot Cargo" clause in its collective agreement with Dominion Stores which permits the union to require Dominion Stores to refuse shipment of products produced by a company with whom the union is engaged in a legal strike. Immediately upon calling the strike at Humpty Dumpty, London, the trade union invoked the "Hot



Cargo” clause referred to above and effectively stopped the sale of Humpty Dumpty products in all Dominion Stores in the Province of Ontario. Dominion Stores are a primary customer of Humpty Dumpty. The union continued to push for the Toronto Teamsters agreement and indeed on January 17, 1977, informed the Company that the terms and conditions embodied in the Toronto Teamsters agreement represented its final position. The company indicated that it was prepared to come “part-way”. The union remained fixed in its demand and following a meeting between Mr. Voisard, the personnel manager of the company, and Mr. Collins, the union representative, at which Mr. Collins told Mr. Voisard that the union was prepared to apply additional pressure and reminded Mr. Voisard that it had taken the union 2 years to achieve its objectives at Seagrams B.C., a collective agreement was entered into by the parties on February 14, 1977. The collective agreement provided the London based employees with the same terms and conditions as those set-out in the Toronto Teamsters’ agreement. In deference to the A.I.B. it was agreed that the company would pay \$20 per week to each employee effective from December 13, 1976 and would place the total package before the A.I.B. for its approval. The A.I.B. received the collective agreement on April 21, one week prior to the announcement of the relocation. The A.I.B. had not ruled on the compensation package prior to the announcement of the company’s decision to alter its system of distribution.

7. Mr. D. Rafuse, the general manager of the company’s Rexdale Division, which encompasses the company’s London operation was ill at the time the collective agreement was entered into. He testified, however, that the decision to settle was “dictated by head office.” He testified further that he “would not have made it – from my end *I can’t live with it.*” He went on to testify that *we believe that the terms have to be different between Toronto and London. If we had to supply the policy we have in Toronto we would be out of business. We will do whatever we have to do to maintain a profitable enterprise.*” Mr. Voisard, the company’s personnel manager, who was involved in the negotiation of the settlement made reference to the Dominion Stores Boycott and the Seagrams threat and testified with regard to the settlement that “we didn’t have a choice.” Mr. Voisard provided the following answers to a series of questions put to him in cross-examination:

Q. “You would have done almost anything to avoid the Teamsters agreement?”

A. Yes

Q. Can you say that collective bargaining had absolutely nothing to do with the decision [to change location]?

A. I am not ready to say that it had absolutely nothing to do with it.

Q. What did it have to do with it?

A. Whether we had an agreement or not we were looking at the whole distribution system – it was part of our consideration of cost.”

8. The evidence establishes that in early March Mr. G. Horniblow, the divisional sales manager, was instructed by Mr. Rafuse to look for alternative warehouse space in

Woodstock and St. Thomas. Mr. Horniblow testified that a short while later he was also asked to look for new space in London. The company witnesses testified that the May's warehouse facilities did not provide easy access to the company's tractor trailers, that there was insufficient parking, that the heating plant was inefficient, and that a retaining wall at the loading dock had been damaged to the extent that it posed a safety hazard. The Board is satisfied that the May's warehouse posed certain problems for the company. The evidence establishes, however, that the company had lived with these problems for a number of years.

9. The company operates central warehouses (as it did in London prior to April 28 and as it does in Toronto, Burlington, Niagara Falls and Windsor), multiple bin warehouses of the type set up around London after April 28 and single bin warehouses. There is no evidence that the single bin distribution system is used to service a Metropolitan area other than London, and the general pattern appears to be otherwise. Mr. Rafuse testified that the company adopted a strict cost control program in 1977 which has resulted in distribution changes in Niagara Falls (2 driver/salesmen replaced with pre-selling salesmen), Burlington (2 trucks taken off the road), Toronto (4 trucks taken off this road) and Windsor (1 truck taken off the road). Mr. Rafuse testified that in view of the problems the company was experiencing with the May's Warehouse, and the potential for cost saving, it was decided to alter the London distribution system, from a central system to a single bin system. Mr. Rafuse testified that a switch to the single bin system would obviate the need for a sales/supervisor and a warehouseman. The company's sales supervisor resigned prior to the implementation of the new system, however, and the warehouseman has been retained in employment. He further testified that *"I also had a labour contract which I felt was arbitrarily imposed on me."* Mr. Horniblow testified that a suitable site could not be located within London and that as a result he investigated sites outside the city. The Board is not prepared to conclude on the evidence before it that the company made an exhaustive search for suitable accommodation within London. The company entered into lease arrangements for the single bin warehouses situated outside London during the period March 16, 1977 to April 21, 1977 and negotiated a settlement to its lease commitment to May's Storage and Warehouse Limited dated April 15, 1977. Humpty Dumpty was required to pay three months' rent (\$1,125) as a lump sum payment, to repair the north wall of the premises and to vacate the premises by May 6, 1977. Thus immediately following the negotiation of a collective agreement for the May's warehouse location, the employer sought to terminate its lease at that location and concurrently arranged for single bin warehouse space in six separate municipalities outside the municipality of London.

10. Mr. Voisard, the company's Personnel Manager who works out of the Montreal Head Office, announced to the employees on April 28 (some two weeks after terminating its lease with May's and the day prior to the implementation of the reorganization) that the company was closing the May's warehouse and instituting a single bin distribution system with a series of bins located outside of London. Mr. Rafuse testified in direct examination that *"it was my decision that these employees be offered employment. Experienced salesmen are the secret of success – the personal attachment. We wanted these salesmen to take these jobs. We offered terms which all route salesmen in Ontario have – other than those working in Toronto."* The evidence as it relates to the April 28 meeting has been set-out in paragraph 2 herein. At the conclusion of that meeting the employees accepted the relocation "under protest." The evidence establishes that subsequent to the adoption of the single bin system the "chain store" route of Mr. F. Gervais, the union president, was divided amongst a number of other

salesmen with Mr. Gervais assigned to four Steinberg accounts and a fixed territory within London. In essence, however, the same driver/salesmen continue to service the same customers as before reorganization. Mr. Horniblow acknowledged in cross-examination that the company had made no significant changes in the routes other than to section-off Mr. Gervais' former route. The Board is satisfied that the same drivers contact virtually the same customers as before the re-organization.

11. The relevant sections of The Labour Relations Act are set out below:

“1. (1)(i) ‘lock-out’ includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, *with a view to compel or induce his employees*, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers’ organization, the trade union, or the employees;

83. Where, on the complaint of a trade union, council of trade unions, employer or employers’ organization, the Board is satisfied that an employer or employers’ organization called or authorized or threatened to call or authorize an unlawful lock-out or locked out or threatened to lock out employees or that an officer, official or agent of an employer or employers’ organization counselled or procured or supported or encouraged an unlawful lock-out or threatened an unlawful lock-out, *the Board may so declare and, in addition, in its discretion, it may direct what action if any a person, employee, employer, employers’ organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful lock-out or the threat of an unlawful lock-out.*

63. (1)*Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.*

(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

(a) seven days have elapsed after the Minister has released or is deemed pursuant to subsection 3 of section 102 to have released to the parties the report of a conciliation board or mediator, or

(b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 3 of section 102 to have released to the parties a notice that he does not consider it advisable to appoint a conciliation board.



- (3) *No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.*
- (4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots case in such a manner that a person expressing his choice cannot be identified with the choice expressed.
- (5) Any vote mentioned in subsection 4 shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.” (Emphasis added).

The statute prohibits strikes and lock-outs during the term of a collective agreement and, where there is no collective agreement, prior to the exhaustion of conciliation services as provided for under the Act. The strike or lock-out (or threatened strike or lock-out) may only be used by the parties during the “open period” and are prohibited at all other times.

12. Counsel for the company argued that the company’s conduct when considered in light of the definition of lock-out found in the Act and the jurisprudence of the Board in respect thereto does not fall within the definition. Counsel for the company admitted that there had been a closing of a place of business, but he argued that the company made a decision based on sound business considerations which was presented to the employees as an “irrevocable decision”. He argued that because the employees were not given an “either/or” choice with respect to whether the company moved from London or with respect to their terms and conditions of employment within the scope of the existing collective agreement (i.e. London), the conduct of the company could not be construed as having been designed to “compel or induce” and hence it could not be construed as a “lock-out” as that term has been defined within The Labour Relations Act.

13. The definition of “lock-out” as found in the Act consists of two elements: the act and the motive or purpose for the act. In order to establish that a lock-out has occurred it is not sufficient merely to show that there has been a closing of a place of employment, or a suspension of work or a refusal by an employer to continue to employ a number of his employees (i.e. a plant closure, relocation, lay-off or contracting out of work etc.). It must also be established that any of these acts was done by the employer with a view to induce or compel *his employees* to refrain from exercising any rights or privileges under the Act or to agree to provisions or changes in provisions respecting terms or conditions of employment etc. Motive is an integral component of the definition and as a result the economic consequences are not in themselves determinative of the issue. The economic consequence must be as a result of one or other of the acts contemplated by the definition having been done by the employer with a view to compel or induce *his employees* in the manner set out in the definition; both the act and the motive must relate to those persons in the employ of the employer as of the date of the lock-out (i.e. “his employees”). (See *re Harry Woods Transport Limited* case, [1976] OLRB Rep. July 341, *Livingston Transportation Limited* case, [1976] OLRB Rep. July 346, *Amalgamated Electric Corporation Limited* case, [1963] OLRB Rep. July 430 *Fleetwood Corporation* case, [1974] OLRB Rep. June 385, *James Howden and Parsons* [1974] OLRB Rep. June 385, *James Howden and Parsons of Canada Ltd.*, [1969] OLRB Rep. July 537 and *Ralph Milrod Metal Products Limited* case, Board Files Nos. 1274-76-U and 1276-76-U, decision dated February 28, 1977).

14. In response to the argument advanced by counsel for the respondent the Board is of a view that the definition is not circumscribed by the scope clause of a subsisting collective agreement. There is no restriction placed upon the word "changes" as it appears in the definition and having regard to the scheme of the Act the Board is not prepared to infer that the "changes" contemplated by the definition are only changes falling within the scope clause of a subsisting collective agreement. The definition has been drafted to expansively encompass economic sanctions which are designed to bring pressure to bear on employees for the purpose of compelling or inducing them to make certain agreements or to refrain from exercising rights under the Act. The definition is an integral component of a legislative structure designed to preserve industrial peace during the term of a collective agreement and during the period of conciliation services, and at the same time to allow the employer the freedom to make business decisions during these periods which are not motivated by those factors set-out in the definition. Absent an explicit restriction, the definition must be read to include economic sanctions which compel or induce employees to accept altered conditions regardless of whether these altered conditions fall within or beyond the scope of a subsisting collective agreement. This is not to say that absent an express provision in a collective agreement to the contrary, an employer cannot move his operation during the term of a collective agreement (which employers often do for reasons other than those proscribed by the Act), nor is it to say that an employer cannot offer to re-employ existing employees (which employers frequently do out of a sense of loyalty or responsibility etc. but not with a view to compel or induce). If, however, both of the elements which constitute a lock-out can be established as having been directed at those in the employ of the employer as of the date the economic sanctions were threatened or put into effect, then, notwithstanding the scope clause of a subsisting collective agreement, it must be found that there exists a "lock-out or threatened lock-out" within the meaning of section 1(1)(i) of the Act.

15. The Board has reviewed the evidence in this matter and is satisfied that the actions of the company on April 28, 1977 constitute a threatened lock-out within the meaning of section 1(1)(i) of the Act. The employer on April 28, 1977 threatened to refuse to continue to employ a number of his employees in that their continued employment was made conditional upon their accepting altered conditions of employment. Mr. Voisard told the employees affected by the closing of the London warehouse that they had the opportunity to maintain their employment status with the company at the new single bin locations. He made it clear, however, that they would not be covered by the subsisting collective agreement but rather by the terms and conditions which covered the driver/salesmen employed elsewhere within Ontario, outside of Toronto; the same conditions as offered to and refused by the trade union on February 1, 1977. The men were told that inventory would be taken on the trucks of those deciding not to relocate; in other words, they would be terminated. The employees were told that the effective date of the relocation would be the next day and that the company wanted their decisions immediately. The Board is satisfied that the employees were faced with a threatened refusal by the employer to continue to employ. The first element of the definition is present in the instant case.

16. The Board must also determine if the second element of the definition (i.e. motive) is present in the instant case as would bring the actions of the company within the meaning of the definition. Mr. Voisard, the company's personnel manager, admitted in evidence that the decision of the company to alter its system of distribution was motivated in part by the desire of the company to operate its London operation under terms and conditions different than those set out in the collective agreement. Mr. Rafuse gave evidence to



this effect as well. Mr. Rafuse also stated to the Board that the company wanted "these salesmen to take these jobs" because experienced salesmen are the "secret of success." The Board can come to no other conclusion than that the employer wished to retain the services of his employees under terms and conditions different than those set out in the collective agreement. Having regard to this fact and to the timing of the announcement made to the employees on April 28 (i.e. the day prior to the effective date of the reorganization) the Board is satisfied that the employer's threatened refusal to continue to employ was made with a view to induce or compel his employees to agree to changes in provisions respecting terms or conditions of employment. The individual employees, many of whom were long service employees of the company, were faced with a choice of immediate unemployment or continued employment under terms and conditions different than those found in the collective agreement. In the circumstances the Board is satisfied that the motive of the employer was to compel or induce his employees to accept altered terms and conditions of employment.

17. This case is distinguishable from those wherein the issue is whether the decision of the employer to refuse to continue to employ is "irrevocable" or conditional. In those cases (see *Harvey Woods Transport* case (supra) and *Livingston Transportation Limited* case (supra), the Board must decide if the decision is conditional upon certain agreements by the employees in which case an inference can be drawn as to the motive of the employer. Counsel for the company has argued that in this case the decision was an "irrevocable" one and therefore it cannot be construed as having been made in order to induce or compel the employees to agree to anything in respect of their London employment. The Board is satisfied that in the instant case the company made an "irrevocable" decision to alter its system of distribution some time prior to April 28 and that the decision was communicated to the employees as an irrevocable decision and that it was not designed to compel or induce the employees to agree to changes in provisions respecting their terms and conditions of employment within the municipality of London (which were enforceable under the collective agreement). In this case the Board has considered the nature of the "irrevocable" decision (i.e. a move to proximate municipalities from which the same area would be serviced) in conjunction with the admitted motive for that decision, the timing of the announcement of that decision, the company's desire to retain its experienced driver/salesmen, its threatened refusal to continue to employ these driver/salesmen and its subsequent rehiring of these driver/salesmen to service essentially the same customers under lesser terms and conditions of employment, and has concluded that the compelling or inducing was not in respect of whether the company would continue to operate in London under altered terms and conditions, but rather whether the employees would agree to work from warehouses outside London at less favourable terms and conditions of employment. Notwithstanding whatever legitimate motives may have co-existed for the company's decision to alter its system of distribution for the London area, the Board is satisfied that the timing and content of its announcement on April 28 was designed to compel or induce its employees to agree to changes in provisions respecting terms and conditions of employment; and indeed the actions of the company achieved the desired result. If, in the circumstances of this case, the employer had not been motivated by a desire to continue to employ "his employees" at lesser terms and conditions then, notwithstanding the possibility of allegations filed under section 79 of the Act, the result under section 83 may have been different.

18. Based upon the evidence before it the Board is also prepared to infer that the conduct of the employer was motivated by a desire to compel or induce its employees to refrain



from exercising certain rights under the Act. Section 6(1) of the Act confers upon the Board the authority to determine the unit of employees that is appropriate for collective bargaining but stipulates that in every case the unit shall consist of more than one employee. The practice of the Board (a practice known to officials of the company) is to certify in respect of single municipalities (the underlying reason for the practice is set out at paragraph 20 of the *Inglis Limited* decision, Board File No. 1564-76-U, dated March 7, 1977). Whereas the single bin distribution system may have certain economic advantages to the company, these advantages are not contingent upon the single bins being located in separate municipalities and indeed, the system becomes less economically advantageous as the single bins extend from the area to be serviced. In the instant case the company has located a single bin in Burr which is 10 miles north of London on Highway #4, another in Lucan which is a further 5 miles north of Burr on Highway #4, and another in Centralia which is a further 10 miles north of Lucan on Highway #4. The driver/salesmen assigned to these warehouses all continue to service the London area. The Board has not been convinced of the economic justification of setting up single bins in separate municipalities extending in a straight line from the area of distribution nor has it been convinced that the company had no other choice in this regard. Having regard to the prior interference by the company in the representation of its employees, to the fact that in the company's mind the union forced it to conclude an unacceptable collective agreement, and to the fact that the company admitted its knowledge of the Board practice with respect to appropriate bargaining units, the Board is satisfied on the balance of probabilities that the decision of the company to locate in separate municipalities and the timing and content of the announcement of that decision was motivated, at least in part, by a desire to compel or induce its employees to refrain from exercising their right to collective representation. The employer has chosen a system of distribution which makes it difficult for these employees to seek union certification and this system has little economic justification. The Board is satisfied that the employer's action was also motivated by a desire to compel or induce his employees to refrain from exercising rights or privileges under the Act. This finding flows from the motive of the employer and is not meant to infer that the Board's practice as it relates to appropriate bargaining units is so immutably fixed that it would prevent collective representation in a situation where an employer dispersed his employees to separate municipalities in order to undermine collective representation.

19. The actions of the company constitute a threatened lock-out within the meaning of section 1(1)(i) of the Act (i.e. a threatened refusal to continue to employ for motives set out in the definition) and having regard to the existence of a subsisting collective agreement, these actions must be found to be unlawful and the Board so declares. Whereas the company was free to lock-out or threaten to lock-out during the so-called open period, it is not free to do so during the term of its collective agreement. The Board declares that the employer threatened an unlawful lock-out on April 28, 1977 and that the motive for and effect of the threat was to compel or induce his employees to agree to changes in provisions respecting terms or conditions of employment and to refrain from exercising rights under the Act. The employees continue to work under the terms and conditions which they were compelled or induced to agree to on April 28, 1977.

20. In response to an unlawful lock-out or threatened unlawful lock-out the Board is given a broad discretion under section 83 of the Act to,

“... direct what action if any a person, employee, employer, employers’ organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful lock-out or the threat of an unlawful lock-out.”

The effect of the threatened lock-out in the instant case has been to induce or compel those in the employ of the employer at the time the threat was made to agree to work without benefit of the terms and conditions contained in the collective agreement negotiated with the company and in addition to restrict the exercise of their right to collective representation under the Act. The Board in the exercise of its discretion under section 83 must restore the essential elements of the status quo which existed prior to the threatened unlawful lock-out. The Board, therefore, directs the company to either:

- (A) return its distribution warehouse(s) to London, Ontario, thereby bringing the affected employees under the scope of the subsisting collective agreement,

or,

- (B) meet with the trade union and amend the recognition clause of the subsisting collective agreement to provide:

“The Company recognizes the Union as the sole collective bargaining agent of all employees of the Company employed *in the Counties of Middlesex, Oxford and Elgin and the Municipality of Centralia* save and except supervisors and persons above the rank of supervisor and temporary employees, provided, however, that any such temporary employees, employed continuously for a period, of more than the probationary period shall be included in the bargaining unit.”

The effect of this amendment will also bring the affected employees under the scope clause of the subsisting collective agreement but will not require the company to otherwise alter its operation.

21. The Board in framing an alternative direction has attempted to restore the essential elements of the status quo which were upset by the threatened unlawful lock-out (to do otherwise in the circumstances of this case would be to refuse a proper exercise of its discretion), and at the same time to minimize the effect of its direction upon the operations of the company. The company is free to continue to operate under the system of distribution which it implemented on May 1st, if it so desires but it must act upon one of the Board’s alternative directions within 30 days of the release of this award.

22. The company is also directed to compensate its employees for all losses incurred by them as a result of the threatened unlawful lock-out from the date of the threatened lock-out (April 28) to the date the company complies with the direction of the Board set out in paragraph 20 above. The Board will remain seized of this matter in the event the parties are unable to agree upon the amount of compensation owing to the affected employees.

23. One further matter remains to be dealt with. The union has requested that the Board direct the parties to negotiate a revised monetary package in order to compensate the driver/salesmen for the increased workload and clerical responsibilities which fall to them as a result of the system of distribution introduced on May 1, 1977. The remedy, if any, for an alleged change in job responsibilities is to be found within the collective agreement which, as a result of the direction issued by the Board in this matter, will continue to cover the employees in question.

#### **DECISION OF BOARD MEMBER J.D. BELL:**

1. I do not agree with the decision of the majority of the Board that the action of the respondent constituted an unlawful lock-out within the meaning of section 1(1)(i) of the Act.

2. I do not intend to comment on the Boulware type tactics employed by the applicant to secure a collective agreement via the "hot cargo clause" in its agreement with Dominion Stores, nor the possible availability to it of other remedies by law, but to deal with the definition in section 1(1)(i) of the Act and the jurisprudence which this Board has established over several years. I also question the remedy directed by the majority in paragraph 20 of its decision and whether they have exceeded their jurisdiction by such an order.

3. The majority decision has detailed the facts which led up to and the actions taken by the respondent which caused this application. The question to be answered is, was this action a lock-out within the meaning of section 1(1)(i) of The Labour Relations Act?

4. The Board has consistently held that a lock-out encompasses two elements, and the majority has quoted several cases in paragraph 13 of their decision. However, I would like to quote the *Livingston Transportation* case, [1976] OLRB Rep. July 346, a recent case which ably states the jurisprudence to be followed by the Board in defining "lock-out".

"7. As stated above, when the respondent indicated to the applicant that it was considering closing the London terminal it also raised the possibility that some of the London based employees might be absorbed into its operations at the other terminals. However, it was made clear that should this occur the employees affected would be paid the wage rates specified for in the collective agreement between the respondent and the International Woodworkers of America. These wages at the present time are in excess of one dollar per hour lower than the wages which were being paid to employees under the collective agreement between the applicant and the respondent. From the time that it was first informed of the possibility of a closure, the applicant strongly opposed the closing of the London terminal as well as having employees paid lower wages to work out of other terminals. As of the date of the hearing in this matter none of the London-based drivers had, in fact, been offered employment at the respondent's other terminals, although a dispatcher was taken on at the St. Thomas terminal as a driver. Mr. Johnston stated in his testimony that the proposal to relocate the London drivers had been conditional upon there being a need



for their services at the other terminals, and that the increased work load at the other terminals had not been sufficient to cause them to require the extra manpower.

8. At the hearing counsel for the respondent submitted in evidence certain financial data relating to the London terminal. This data revealed a sharp decline in the terminal's operating profit (exclusive of the portion of head office costs charged against the terminal as well as any provision for taxes) commencing in August of 1975, as well as actual operating losses in every month of its operation from October of 1975 on, with the one exception of a modest operating profit in December of 1975. It would appear from the data filed that one reason for the losses was a rise in costs as a proportion of revenue. However, from January 1976 until the closing of the terminal in April the data also reveals a substantial decline in the revenue of the London terminal. Counsel for the applicant did not challenge the financial data put forward by the respondent. However, he did contend quite vigorously that the financial situation of the London terminal was the result of a 'draining off' of much of the more profitable work to terminals outside of London.
9. Section 1(1)(i) of The Labour Relations Act defines a lock-out as follows:

"'lock-out' includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees;"

From this definition it follows that a lock-out comprises two elements. The first is a closing of a place of work or a refusal to continue to employ a number of employees. The second element, which qualifies the first, requires that the foregoing action of an employer be done 'with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions or employment ...' (See: *S. McNally & Sons Limited* [1971] OLRB Rep. July 430). There is no doubt in this case that the first element is present. The issue remains, however, as to whether or not the second element is also present.

10. The position of the respondent with respect to the motive behind the shutting down of its London operation was simply that it had done so for financial reasons and not with a view to compel or induce anyone to do anything. Counsel for the respondent indeed contended that in the circumstances of this case, the actions of the respondent had come within the scope of Section 68 of the Act. Section 68 states that:

‘Nothing in this Act prohibits any suspension or discontinuance for cause of an employer’s operations or the quitting of employment for cause if the suspension, discontinuance or quitting does not constitute a lock-out or strike. R.S.O. 1970, c. 232, s. 68.’

11. Counsel for the applicant contended that the closure of its London terminal by the respondent was not the straight forward closure for financial reasons as it might at first appear. In particular, he noted that a not insignificant portion of the work previously handled out of the London terminal was still being performed, except that it was now being done by other employees working out of other terminals under a different collective agreement and at a lower rate of pay. He contended that where there is work that can be done under a collective agreement and the employer affects a closure of his premises but at the same time continues to operate in such a manner that some of the same work is still being done, then the employer is in fact compelling his employees by locking them out to refrain from exercising their right to work at the rate of pay set out in the collective agreement. He also stated that since in this case a significant motive behind the employer’s actions was to compel employees to cease exercising their right to work at the wage level specified for in their collective agreement, and since this motive was unlawful, then the closing down of the terminal and the refusal to continue to employ those persons who had worked there was also unlawful even though other considerations may also have been involved.
12. There is no doubt but that the closure by the respondent of its London terminal has had severe repercussions on the persons formerly employed there, a number of whom had been long service employees of Spicknell Transport. However, with respect to the application before it the Board is limited to the issue of whether or not the closing of the terminal and the resultant discharges constituted a lock-out within the meaning of Section 1(1)(i) of the Act. In this regard even though the respondent has transferred part of its London business to other terminals, the fact remains that the London closing was not accompanied by any intimation, either direct or inferential, of a possibility of continuing the operation conditional upon the agreement of the employees to cease exercising certain of their rights or privileges under the Act or to their agreeing to any changes in provisions respecting their conditions

of employment. This being the case it cannot be said that the closure of the terminal came within the definition of 'lock-out' in Section 1(1)(i). (In this regard see *Amalgamated Electric Corporation Limited* [1963] OLRB Rep. Oct. 403 and *Fleetwood Corporation*, [1974] OLRB Rep. June 385).

13. Although a number of cases were cited to the Board by counsel for both parties, counsel for the applicant placed particular stress on the decision of the British Columbia Labour Relations Board in the *British Columbia Distillery Company Limited* case [1975] 2 Canadian LRBR 183, and it would appear appropriate to deal with it specifically. In that case the majority of the panel hearing the matter decided that the closure of part of its business by an employer, following the service upon it by a union of a notice to bargain for the renewal of a collective agreement, constituted a lock-out within the meaning of Section 1(1) of the British Columbia Labour Code. However, in reaching that decision the majority concluded after a careful review of the particular bargaining relationship involved as well as the timing of the shutdown that a significant motivation behind the employer's decision was to compel its employees through the union to agree to certain bargaining proposals. The evidence before this Board, however, does not lead to the same factual conclusion. In particular here there is no indication that the respondent by closing down its London terminal was seeking to get its employees to agree to any bargaining proposals."

5. Based upon the evidence before us in this case it is clear that the respondent made a decision to close its London warehouse and split up the operation into single bin operations elsewhere. This decision was not a threat but was *fait accompli* and was not accompanied by any intimation, whether direct or inferential, of a possibility of continuing the operation in the May's Warehouse in London conditional upon the agreement of the employees to cease exercising certain of their rights or principles under the Act or to agreeing to any changes in provisions respecting their conditions of employment.

6. The employees were given the opportunity to continue their employment with the respondent out of the new locations. If they chose not to do so then they would be separated. This action cannot be construed to be a lock-out for the simple reason no threat was made.

7. Therefore, I do not find the second element of a lock-out to be existent in this case because there was not an option open to the employees as the decision to move was irrevocable and could not be reversed by the employees agreeing to changes in their conditions of employment.

8. I question the jurisdiction of the majority to direct the respondent to return its warehouse to London or to amend its agreement with the union to provide a multi county recognition clause.



9. It is not the practice of the Board to grant a county-wide bargaining unit. A unit covering several counties without agreement of the parties concerned is without precedent. Further, I do not believe the broad powers given the Board in Section 83 can be used to direct the respondent to operate its business from a specific location.

10. Therefore, I would dismiss this application.

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**1665-76-U** Association of Professional Student Services Personnel, (Applicant), – v. – **The Board of Education for the Borough of Etobicoke**, (Respondent), – v. – Federation of Women Teachers' Associations of Ontario, Women Teachers' Association of Etobicoke, Ontario Secondary School Teachers Federation, and District 12, Ontario Secondary School Teachers Federation, (Intervenors).

**Reference – Section 95(2) – Whether qualified teachers employed as attendants counsellors are employees.**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members D.B. Archer and N.B. Satterfield.

**APPEARANCES:** *Don Robinson, Murry McGee, Dawn Adams, Roberta Tallon and Pat Massa for the applicant; R.A. Williamson, W.H. Hall and S. Sauro for the respondent; Pamela A. Sirgudson for all of the intervenors; Kay Dyson for the Federation of Women Teachers' Associations of Ontario and the Women Teachers' Association of Etobicoke; Douglas E.G. Phibbs and William Markle for the Ontario Public School Men Teachers' Federation.*

**DECISION OF PAMELA C. PICHER, VICE-CHAIRMAN AND BOARD MEMBER N.B. SATTERFIELD:** July 15, 1977

1. This is an application under sections 95(2) and 79 of *The Labour Relations Act*.

2. Pursuant to section 95(2) the applicant has asked the Board to determine whether the seven persons listed below are employees under the Act. The applicant has also applied for relief under section 79 of the Act alleging that the respondent has violated sections 14, 59(1) and 70(1) of the Act. The applicant alleges *firstly*, that by refusing to bargain with respect to the seven persons listed below the respondent has bargained in bad faith in contravention of section 14, *secondly*, that by negotiating directly with these people the respondent has violated section 59(1) of the Act and *thirdly*, that by bringing them into the unit during negotiations the respondent has violated section 70(1).

3. The following facts provide the necessary background:

- (1) The persons in dispute and the information relevant to each are set out in the following chart:

<u>Name</u>	<u>Date of Hire Under Teaching Contract</u>	<u>Date Engaged in Capacity of Psychologist or Attendance Counsellor</u>	<u>Present Capacity</u>
Art Keating	September, 1967	September, 1967	Psychologist
Wally Freel	September, 1965	September, 1972	Attendance Counsellor
Naomi Emmett	September, 1971	January, 1976	Attendance Counsellor
Terry Scheeler	September, 1975	January, 1975	Attendance Counsellor
Russ Crerar	September, 1970	September, 1975 (Quit June, 1976)	Attendance Counsellor
Ted Williamson	September, 1971	September, 1976	Attendance Counsellor
Dr. Marie Murphy	September, 1971	September, 1976	Attendance Counsellor

- (2) On October 21, 1975 the complainant Association was certified as the exclusive bargaining agent for the following bargaining unit established by the agreement of the parties:

“all psychologists, assistants to psychologists, social workers and attendance counsellors employed in the Student and Special Services Branch of the Board of Education for the Borough of Etobicoke in the Borough of Etobicoke save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons regularly employed for not more than 24 hours per week.”

- (3) At the date of application for certification there were two persons employed by the respondent under the permanent teacher's contract who were performing on a full-time basis the duties of a psychologist or an attendance counsellor. These were Mr. Keating and Mr. Freel.
- (4) As indicated by the above chart, three persons hired under a permanent teacher's contract became full time attendance counsellors after certification and the commencement of bargaining.
- (5) All of the seven persons, prior to being engaged as psychologists or attendance counsellors, had been employed as classroom teachers either with the respondent or elsewhere.
- (6) The respondent can and does on occasion transfer attendance counsellors to the classroom.
- (7) Following certification the complainant gave formal notice to bargain by a letter dated October 24, 1975.

- (8) The parties met in negotiation approximately ten times and reached an interim agreement pending A.I.B. approval; approval was ultimately given on July 29, 1976.
- (9) On May 28, 1976, the Association claimed for the first time that qualified teachers under contract who performed the duties of psychologists and/or attendance counsellors should be part of its bargaining unit. This claim was denied by the respondent and the parties agreed to discontinue negotiations until the status of such persons was decided.
- (10) Section 24 of *The Education Act, 1974*, S.O. 1974, c. 109 requires the Board of Education to appoint at least one attendance counsellor; the Act does not require the attendance counsellor to be a qualified teacher. Under the Act attendance counsellors are responsible for the enforcement of compulsory school attendance and for informing parents and guardians of the consequence of their children's non-attendance. In addition to assisting the students with school attendance difficulties they help students whose family, social or personal problems are interfering with their adjustment to school. They provide long and short term counselling to help resolve the problems that may inhibit a child from adjusting to school.
- (11) The undisputed evidence of the witnesses indicates that most of the attendance counsellors have some contact with the classroom teacher. Ms. Roberta Tallon, who is not a qualified teacher, stated that she has gone into the classroom to assist a teacher with children on a one to one basis. Ms. Naomi Emmet, a qualified teacher, indicated that on numerous occasions she has set up behaviour modification programs to be used in the classroom to help the problem students. She has, in her capacity as attendance counsellor, actually be in charge of a class and prepared the day's program. Ms. Emmet offered the opinion that her background as a teacher was particularly valuable to her attendance counsellor work in developing behaviour modification programs. In an overall assessment of the job, however, the parties agree that the amount of time an attendance counsellor spends in the classroom is fractional.
- (12) The appointment of psychologists by the board is provided for in paragraph 5(ii) of section 147(1) of *The Education Act, 1974*. Students with learning disabilities are among those who may be referred to a psychologist. One recognized channel of referral is through the attendance counsellors.
- (13) Part of the applicant's concern in this case emanates from the fact that the number of non-teacher attendance counsellors has been decreasing. The recent advertisements for attendance counsellors



have specified teaching qualifications as a requirement although such qualifications are not required by the Act. Mr. S. Sauro, the Superintendent of Student and Special Services, stated that he views the group of attendance counsellors as an inter-disciplinary team possessing a wide range of skills. One attendance counsellor is a qualified nurse, another a qualified doctor. He testified that it was because he felt the team had become low on teachers that he specifically designated teaching qualifications in the advertisements referred to. He stated that he had no intention of making all attendance counsellors qualified teachers.

4. Before dealing with the application under section 95(2) or section 79, the Board must address a preliminary issue raised by the parties, that issue being whether the seven persons in question are excluded from the coverage of the Act by the operation of section 2(f) which reads as follows:

“2. This Act does not apply,

(f) to a teacher as defined in *The School Boards and Teachers Collective Negotiations Act, 1975*, except as provided in that Act.”

If the Board determines that section 2(f) applies so that *The Labour Relations Act* does not apply to these persons, then the Board would be without jurisdiction to apply section 95(2) of the Act to decide whether the persons are employees. Additionally, because the section 79 complaints are based exclusively on the respondent's dealings with the applicant vis-a-vis these employees, the Board need not enter the section 79 inquiry if it decides that the persons in question are not covered by the Act.

5. *The School Boards and Teachers' Collective Negotiating Act*, S.O. 1975 c. 72 (hereinafter referred to as the *S.B.T.C.N. Act*), is an Act which regulates collective bargaining between school boards and teachers. To avoid an overlapping jurisdiction, section 2(f) of *The Labour Relations Act* excludes from the coverage of *The Labour Relations Act* those persons whose bargaining relationship is regulated by the *S.B.T.C.N. Act*, i.e. those persons defined as “teacher” by section 1(m) of that Act which reads as follows:

“ ‘teacher’ means a person,

- (i) who holds a valid certificate of qualification as a teacher in an elementary or secondary school in Ontario,
- (ii) who holds a letter of standing granted by the Minister under *The Education Act, 1974* or
- (iii) in respect of whom the Minister has granted a letter of permission under *The Education Act, 1974*,

and who is employed by a board under a contract of employment as a teacher in the form of contract prescribed by the regulations under *The Education Act, 1974*, but does not include a supervisory officer as defi-

ned in *The Education Act, 1974*, an instructor in a teaching-training institution or a person employed to teach in a school for a period not exceeding one month;"

The applicant has not alleged that any of the seven persons are among those specifically excluded from the above definition.

6. The parties agree that the section 1(m) definition of "teacher" contains at least two criteria: (1) the proper qualifications, i.e. the persons must conform with the requirements of either section 1(m)(i), (ii) or (iii) and (2) the proper form of contract as set out in the regulations under *The Education Act, 1974*. The parties further agree that all seven persons in question meet these two criteria.

7. The disagreement of the parties centers on whether the section 1(m) definition incorporates a functional component as a third criterion, i.e. actual performance of classroom teaching duties. Counsel for the applicant submitted that the phrase in the section 1(m) definition, "... employed by a board under a contract of employment *as a teacher* in the form of contract prescribed ..." (emphasis added) means that to fall within the definition one must actually be engaged in classroom teaching. Counsel for the respondent and interveners, on the other hand, argued that the phrase "as a teacher" describes the kind of contract being referred to and not the type of function being performed under the contract.

8. A definition of "teacher" falling between the two positions described above was not suggested to the Board. It may be that "as a teacher" reflects a functional requirement but that it should be given a broad enough interpretation to include the performance of those duties which may be described as being an integral part of the teaching programme.

9. The language of section 1(m) is ambiguous and capable of any one of the three suggested interpretations; thus we must look beyond the words of the section to determine which interpretation is the most appropriate.

10. In support of its position counsel for the applicant cited the Board's decision in *Hodgson's Steel and Ironworkers Limited*, [1976] OLRB Rep. June 312. The Board concluded in that case that the individual in question did not fall within the definition of "professional engineer" set out in section 1(1)(1) of *The Labour Relations Act* because he was not employed in a professional capacity although he was a member of the engineering profession. The *Hodgson's* case may be distinguished from the case at hand because the definition of "professional engineer" in *The Labour Relations Act* specifically requires that the individual be employed in a professional capacity, while the definition of "teacher" incorporated in section 2(f) is ambiguous.

11. Counsel for the respondent and interveners turned to *Ontario Teachers' Federation v. Metropolitan Separate School Board* (1977), 12 O.R. (2d) 499 (Ont. C.A.) to support their position. The decision of the majority given by Dubin, J.A. held that notwithstanding the fact that the qualified teachers in question were employed by the school board as co-ordinators in an exclusively non-teaching capacity, they fell within the definition of "teacher" under the *Teaching Profession Act*, R.S.O. 1970 c. 456.

12. The definition of "teacher" in *The Teaching Profession Act* contains only two criteria, proper qualifications and the proper form of contract. Unlike the situation at hand, there is not even an ambiguous reference to the duties being performed. Accordingly, the mere finding in *Metropolitan Separate School Board* that the non-teaching co-ordinators fell within the definition of "teacher" under *The Teaching Profession Act* is not decisive of this situation where the definition is ambiguous.

13. What is more pertinent to this case, however, is the court's position that the qualified teachers who performed exclusively non-classroom teaching duties as co-ordinators were properly employed under the permanent teacher's contract, which is the same form of contract held by the persons in issue in this case. Taking specific note of the provisions of section 3 of the permanent teacher's contract, Dubin J.A. drew the following conclusion at p. 501:

"Section 3 of such contract provides:

3. The Teacher agrees to be diligent and faithful in his duties during the period of his employment, and to perform such duties and teach such subjects as the Board may assign under the Acts and regulations administered by the Minister.

A permanent teacher's contract clearly contemplates that teachers may perform duties other than teaching duties. The fact that the 'co-ordinators' are not assigned teaching duties does not make the duties assigned to them repugnant to the permanent teacher's contract."

14. Relating this decision to the case at hand counsel for the respondent and interveners argued that the Court of Appeal's decision indicates that the section 1(m) definition of "teacher" in the *S.B.T.C.N. Act* does not contain a functional component. In the Board's opinion, however, the *Metropolitan Separate School Board* decision does not go as far as the respondent and interveners suggest. In his decision Dubin, J.A. highlights the fact that the duties performed by the co-ordinators were an integral part of the teaching programme. At p. 500 he says,

"It is apparent that each 'co-ordinator' is an integral part of the teaching programme which the board has established."

At p. 502 he expresses the opinion that,

"... neither the school board nor a teacher can evade the mandatory provisions of the *Teaching Profession Act* and the *Administration Act* by assigning to a teacher who was legally qualified to teach in an elementary or secondary school a job classified within the teaching programme of the board not provided for by the relevant statutes or Regulations ..."

The decision firmly supports the position that the section 1(m) definition of "teacher" does not require the performance of classroom teaching duties. The decision falls short, however, of suggesting that the definition contains no functional requirement whatsoever.



15. An interpretation of “teacher” in section 1(m) which extends beyond requiring the persons to be teaching in the classroom is supported as well by the overall scheme of *The Education Act, 1974* which provides for both the exclusive and partial assignment of non-classroom teaching duties to teachers in their capacity as “teachers” under the Act. Paragraph 2 of section 147(1) provides that the board may determine the terms upon which teachers are to be employed and may prescribe their duties. The Act does not restrict the school board to using a teacher to teach in the classroom. Paragraph 27 of section 147(1), for example, specifically enables the board to appoint teachers so qualified to positions as guidance counsellors. Paragraphs 37 and 38 of section 147(1) permit the board to employ and pay teachers to educate children in charitable organizations and detention homes. While some of the duties so performed would correspond to classroom teaching duties, the terms of the section are broad enough to encompass educational responsibilities beyond the classroom. *The Education Act, 1974* further provides for the appointment of teachers to the School Board Advisory Board (section 175), for their assignment to school ground duty (section 229(1)(e)) and for their participation in professional activity days (section 229(1)(h)).

16. With this background we turn to consider which of the three possible interpretations of the section 1(m) definition of “teacher” is the most consistent with the general purpose and scheme of the *S.B.T.C.N. Act* and which definition is the most responsive to accepted guidelines for determining units appropriate for collective bargaining.

17. Section 2 of the *S.B.T.C.N. Act* states that,

“the purpose of this Act is the furthering of harmonious relations between boards and teachers by providing for the making and renewing of agreements and by providing for the relations between boards and teachers in respect of agreements.”

To this end the Act provides the specific framework within which the parties shall negotiate their collective agreements. As well the Act clothes teachers with various rights and duties. For example, a teacher may not take part in a strike unless certain conditions are met (section 64); the contract of employment of a teacher shall not be terminated by reason of his participation in a lawful strike (section 70) and the board shall not lock out a teacher except as specifically provided by the Act (section 69(3)). The Act further provides several instances in which a teacher shall not be paid his salary (section 69(5)).

18. The nature of the *S.B.T.C.N. Act* suggests to the Board that predictability of one’s status under the *S.B.T.C.N. Act* as either a teacher or a non-teacher is more inclined to promote a stable relationship between school boards and teachers than continual uncertainty dependent on a particular assignment under the teacher’s contracts. Given the scheme of *The Education Act, 1974* coupled with *The Metropolitan Separate School Board* decision, sliding in and out of the scope and dictates of the *S.B.T.C.N. Act* would be a constant possibility if the definition of “teacher” under the *S.B.T.C.N. Act* required the person to be teaching in the classroom as suggested by the applicant.

19. Under the *S.B.T.C.N. Act* those persons who fall within the category of “teacher” form a statutory bargaining unit. Given the ambiguous wording of the section 1(m) definition of teacher it is reasonable to assume that the intention of the legislature was to import

into the delineation of the teachers' bargaining units the longstanding concern of this and other labour tribunals to minimize fragmentation by structuring viable bargaining units based on a broad community of interests. (See for example *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7.) The process of definition involves a balancing of these two countervailing concerns. While too diverse a unit may put heavy strains upon the bargaining process, too narrow a unit may cause undue fragmentation resulting in a less effective presence at the bargaining table.

20. In light of these principles the Board is persuaded that the definition of "teacher" in section 1(m) incorporates those qualified teachers employed under a contract with the board who perform duties within the teaching programme in the broad sense. It is this interpretation which would reflect a legislative scheme which strikes an optimal balance between the concerns of community of interest, on the one hand, and undue fragmentation, on the other. The group so defined would insure a community of interests in that all would be performing interrelated jobs each aimed at furthering the education of students. It would further avoid undue fragmentation in that it would include teachers performing duties both inside and outside the classroom.

21. Both of the alternate definitions cause a problem in the balancing of these two labour relations concerns. The requirement that qualified teachers be teaching in the classroom insures a group with a strong community of interests but it raises the possibility of fragmentation. Those teachers who are excluded from the unit by this requirement would have to bargain in smaller units which might not be viable and which might not represent their interests as qualified teachers employed under a teacher's contract. On the other hand, a definition without a functional requirement avoids the possibility of fragmentation but it jeopardizes the strength of the group's community of interest in that it may include people whose jobs are unrelated to the teaching programme.

22. In bringing together the strands of the above analysis the Board finds that it must decline to adopt the position of the applicant. An interpretation of "teacher" in section 1(m) of the *S.B.T.C.N. Act* which requires that a qualified teacher actually teach in the classroom would run counter to the *Metropolitan Separate School Board* decision, the scheme of *The Education Act, 1974*, as well as the scheme and purpose of the *S.B.T.C.N. Act* viewed in the light of accepted labour relations principles.

23. We further decline to accept the definition of "teacher" as anyone properly qualified and working under the appropriate contract regardless of their duties and responsibilities as argued by the respondent and interveners. This definition goes beyond the *Metropolitan Separate School Board* decision, and would be less in keeping with the scheme of labour relations as conceived and fostered by the Legislature than the definition adopted by the Board.

24. We find, therefore, that the phrase "as a teacher" in the section 1(m) definition of teacher contained in the *S.B.T.C.N. Act* describes the type of work performed by the teacher rather than the type of contract. We interpret "as a teacher" broadly and find that it includes those duties that fall within a broadly defined teaching programme. The section 1(m) definition, therefore, contains three criteria: proper qualifications, the proper form of contract and the performance of duties within the teaching programme.

25. By the agreement of the parties all seven persons in question are properly qualified and are employed under the proper form of teacher's contract. Accordingly they meet two of the three criteria. Do they also meet the third criterion; do they function sufficiently "as a teacher?" To the extent that the attendance counsellors and psychologists help to bring students into the classroom and help them resolve problems that are impediments to learning, they are a vital part of the teaching programme. Having regard to the evidence respecting their duties we are satisfied that the duties of the attendance counsellors and psychologists are intrinsic to the teaching programme and that they are, therefore, teachers within the meaning of section 1(m) of the *S.B.T.C.N. Act*.

26. Accordingly, each of the seven persons in question is excluded from the coverage of *The Labour Relations Act* by the operation of section 2(f) of that Act.

27. The application is hereby dismissed.

#### **DECISION OF BOARD MEMBER D.B. ARCHER:**

1. The facts as outlined by the majority are not in question. The applicant in this case was certified as the bargaining agent for a unit consisting of "all psychologists, assistants to psychologists, social workers and attendance counsellors employed in the Student and Special Services Branch of the Board of Education for the Borough of Scarborough: save and except. ..." There is no question the seven named persons fall into these named categories. There are others in these categories who do not have a teacher's contract or certificate who are covered by the certificate of certification issued by The Labour Relations Board. There is therefore functional coherence between them and the others who serve in the same capacity.

2. In my opinion whatever their status is as teachers, they are now attendance counsellors etc. and are covered by the Board's certificate.

3. It may well be that sometime in the future they may wish to return to teaching where they would be covered by the Teacher's agreement.

4. The result of the majority finding will be that seven (7) members will be bargained for by one agency while the rest will be bargained for by another. Surely this is not the purpose of either the Labour or Education Bargaining Act. I would therefore have found that these seven (7) persons were covered by the Labour Board's certificate.

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**0310-77-U** Graphic Arts International Union, Local 28-B, (Complainant),  
v. **Bruce Henderson Limited**; Council of Printing Industries of Canada,  
(Respondent).

**Section 79 – Duty to Bargain in Good Faith – Whether employer may revoke bargaining authority of unaccredited employer association – Whether 11th hour revocation constitutes bargaining in bad faith.**

**BEFORE:** A. L. Haladner, Vice-Chairman, and Board Members M. J. Fenwick and F. W. Murray.

**APPEARANCES:** *Harold F. Caley, Charles Buhler and Frank O'Reilly for the complainant; Walter R. Stevenson and Robert Leslie for Bruce Henderson Limited; Colin Morley, Corrine Murray and Edwin C. Caldwell for the Council of Printing Industries of Canada.*

#### **DECISION OF THE BOARD:**

1. This is a complaint brought under section 79 of The Labour Relations Act. The complainant seeks a declaration from the Board that Bruce Henderson Limited (Henderson) is bound by the collective agreement between itself and the Council of Printing Industries of Canada (the Council) entered into on April 25, 1977 as well as an order requiring Henderson to sign the collective agreement and put into effect its terms. In the alternative, the complainant requests that the Board issue an order directing Henderson to bargain in good faith.

2. Because the complaint alleged no violation of the Act by the Council, and because the relief sought could not in any way have affected the Council's legal rights, the Council has been deleted as a respondent at the request of its counsel.

3. The Board's hearing into this matter proceeded by way of an agreed statement of facts. There were no witnesses called. The Board considers the following facts relevant:

- i) A collective agreement between the complainant and the Council was to expire on December 31, 1976. Henderson was a member of the Council bound by that collective agreement.
- ii) By letter dated October 8, 1976, the complainant gave notice to bargain to the Council, and to each of the forty-five members of the Council, including Henderson, bound by the collective agreement. The letter read:

“Dear Sir:

Re: Notice of Desire to  
Negotiate

We hereby give notice of desire to negotiate a new or amended Agreement, in accordance with Article 48 – Termination, of the current Agreement, effective January 1, 1976.

The current Agreement terms were established through negotiations with the Council of Printing Industries of Canada on behalf of member companies comprising a majority in the industry. We are currently advising the C.P.I. of our desire to commence negotiations.

In order to facilitate proceedings on this matter we require an early indication of your intentions:

- (i) Will your Company be represented by the Council of Printing Industries? and/or
- (ii) Will your Company be governed by the settlement reached with the Council of Printing Industries?

Your co-operation by giving this Notice immediate attention and response will be greatly appreciated.

Yours very truly,

C. Buhler,  
President."

- iii) On October 8, 1976, the Council acknowledged receipt of the complainant's letter giving notice to bargain. Henderson did not reply to the complainant's letter.
- iv) On or about November 11, 1976 the Council gave to the complainant a list of employers on whose behalf the Council was authorized to negotiate amendments to the existing collective agreement. Henderson was among the thirty-three member employers included in that list.
- v) On March 21, 1977, the complainant was advised that the Minister of Labour had decided not to appoint a Board of Conciliation.
- vi) On or about April 13th, the complainant and the Council reached an oral agreement on a Memorandum of Settlement.
- vii) On April 20th, the Council mailed the proposed terms of settlement to each of its members, including Henderson, on whose behalf it was authorized to bargain.
- viii) On April 22nd, at approximately 11:30 a.m., the complainant and the Council signed a Memorandum of Terms of Settlement. Henderson was included in the list of signatory employers of the Council, of which there were then thirty-one. In the Memorandum of Terms of Settlement, it was agreed that "the (complainant) and the (Council) negotiating committees (would) recommend the terms of settlement to their respective members" and that "the proposed terms of settlement (would) not constitute a collective agreement until ratified by both parties".

- ix) At approximately 3:00 p.m. on April 22nd, the complainant received a telephone call from the Council advising that Henderson had revoked its authorization for the Council to represent it in negotiating a collective agreement with the complainant. This call was subsequently confirmed by a letter dated April 22nd, and received by the complainant in the late afternoon of that same April 22nd.
- x) On April 24th, the membership of the complainant ratified the Memorandum of Terms of Settlement. On April 25th, the Memorandum was ratified by the Council, and it thus became a collective agreement. Ratification took place in accordance with the by-laws of the Council which required a majority of those members who had not revoked their authorization to the Council to vote in favour of accepting the proposed collective agreement.
- xi) A formal Memorandum of Agreement was signed by the Council and the complainant on April 29th. Henderson was not among the thirty signatories to the Memorandum of Agreement.
- xii) On May 4th, the complainant wrote the following letter to Henderson:

"Dear Mr. Leslie:

We have been unable to confirm your intentions with respect to contract renewal. Therefore, be advised that unless a settlement is reached within one (1) week from today, by May 10, 1977, we will consider ourselves free to exercise the options open to us in this matter.

Yours truly,

C. Buhler,  
President."

- xiii) On May 6th, Henderson, through its solicitors, replied as follows:

"Dear Sirs:

We are acting for Bruce Henderson Limited and have been handed your letter to Mr. Leslie of May 4, 1977.

We understand as well that you have been advising certain of the employees of that Company that they are going to be in a position to go on strike within the next few days. We would suggest that this is hardly the atmosphere in which to commence bargaining.

As Mr. Leslie has advised you, he has not had much experience in negotiating a collective agreement and he has therefore asked us to assist him if we can, and you may rest assured that the Company is prepared to proceed at this time to attempt to bargain an applicable collective agreement.



We have asked Mr. Leslie to provide to us a comprehensive list of the areas where it is felt that the agreement must be changed to ensure that the Company's operation remains a viable one and we would ask that you provide to us a memorandum or statement of some sort of the Local's position with respect to proposed amendments to the agreement.

Perhaps you might as well contact the writer at your convenience and arrange a time for a meeting to see if we can at least define the areas to be negotiated.

In the meantime we would suggest that if the employees involved are to be approached, they should be given proper information as to the situation under the Labour Relations Act.

Yours very truly."

- xiv) Prior to April 22nd, Henderson had negotiated through the Council, seven consecutive collective agreements with the complainant.

4. This case raises two questions of importance for the practice of employer organization bargaining under The Labour Relations Act. The first question is whether a member of an employers' organization which has authorized the organization to bargain on its behalf can withdraw from the bargaining process after a tentative agreement has been reached but before a binding collective agreement has been entered into. The second question, which need arise only if the first is answered in the affirmative, is whether an employer who does this violates its statutory duty to bargain in good faith.

5. Counsel for the complainant argued strenuously that it would not be in the interests of good labour relations to allow a member of an employers' organization to opt out of organization bargaining after a tentative agreement with a trade union had been reached. From this premise, he attempted to demonstrate by a rather ingenious construction of the Statute and the jurisprudence that the Legislature has enacted this policy into law. We need not elaborate upon the details of counsel's argument. Suffice it to say that it misconceives the policy of the Act with respect to multi-employer bargaining.

6. Unlike the legislation in other jurisdictions, such as the British Columbia or Canada Labour Codes, The Ontario Labour Relations Act does not provide for accreditation of employers' associations as exclusive bargaining agents for employers operating outside of the construction industry. By contrast with these other jurisdictions, multi-employer bargaining in the industrial sector of the Province is based almost exclusively on the concept of voluntarism. Under The Labour Relations Act, an individual employer not only has a free choice about whether it will bargain through an employers' organization, but once it decides that it is in its best interest to have such an organization bargain on its behalf, it is permitted to resign from the organization or revoke its authorization to bargain even after negotiations for a collective agreement have begun. The only limitation on a member employer's freedom is that it cannot avoid being bound by a collective agreement that has been entered into on its behalf. The policy of the Act is that while an individual member who is dissatisfied with either the quality of the representation it has been receiving or the progress of a

particular set of negotiations, should be able to return to single employer bargaining at any time during the bargaining process, the participants must be assured that this cannot occur after a binding collective agreement has been concluded; otherwise, employer organization bargaining would be an exercise in futility with no incentive for participation in the first place.

7. This policy, which may be described as compelling stability in collective agreements but not stability in bargaining is embodied in section 43. Section 43(1) establishes the binding effect of collective agreements which result from multi-employer bargaining on members of the employers' organization on whose behalf the organization bargained. It provides as follows:

A collective agreement between an employers' organization and a trade union or council of trade unions is, subject to and for the purposes of this Act, binding upon the employers' organization and each person who was a member of the employers' organization at the time the agreement was entered into and on whose behalf the employers' organization bargained with the trade union or council of trade unions as if it was made between each of such persons and the trade union or council of trade unions and upon the employees of the bargaining unit defined in the agreement, and, if any such person ceases to be a member of the employers' organization during the term of operation of the agreement, he shall, for the remainder of the term of operation of the agreement, be deemed to be a party to a like agreement with the trade union or council of trade unions.

8. Section 43(2) defines the circumstances in which an employers' organization can be said to have bargained on behalf of a member employer, such that the member will be bound by the resulting collective agreement. Put in the language of the Supreme Court of Ontario in the *Fullerton-Weston Publishing Ltd.* case, 71 CLLC, ¶14,083, section 43(2) provides how and when an employer can avoid being bound by a collective agreement which is being negotiated on its behalf. It states:

When an employers' organization commences to bargain with a trade union or council of trade unions, it shall deliver to the trade union, or council of trade unions a list of the names of the employers on whose behalf it is bargaining and, in default of so doing, it shall be deemed to bargain for all members of the employers' organization for whose employees the trade union or council of trade unions is entitled to bargain and to make a collective agreement at that time, except an employer who, either by himself or through the employers' organization, has notified the trade union or council of trade unions in writing before the agreement was entered into that he will not be bound by a collective agreement between the employers' organization and the trade union or council of trade unions.

9. In this case, Henderson did notify the trade union in writing before the agreement was entered into that it would not be bound, and accordingly, the collective agreement between the Council and the complainant entered into on April 25, 1977 is not binding on Henderson.

10. In deciding whether Henderson's conduct constitutes a violation of its duty to bargain in good faith, we begin from the premise that an employer cannot use the freedom provided by section 43 to avoid its obligation under section 14 any more than an employer can use the freedom provided by section 70 for such a purpose (as was held in *DeVilbiss (Canada) Limited* [1976] OLRB Rep. Mar. 49). The freedom provided by section 43 must be integrated with the obligation imposed by section 14. Thus an employer that authorizes an employers' organization to bargain on its behalf so as to avoid its obligation to sit down and negotiate a collective agreement with a trade union breaches its duty to bargain in good faith. Such conduct is tantamount to a refusal to recognize the status of the bargaining agent for collective bargaining purposes.

11. That is not to say, however, that every employer that gives a late notice to a trade union pursuant to section 43(2) will be found to have contravened section 14. While the Board will view with suspicion the giving of a section 43(2) notice at the concluding stages of the bargaining process, particularly when, as here, it was given after a tentative agreement between the employers' organization and the trade union had been reached, we are not prepared to lay down a blanket rule holding all employers who give notice at this time in violation of section 14. That was the position urged upon us by the complainant.

12. As with any other conduct which is alleged to evidence the presence of bad faith bargaining, the significance of a late notice under section 43(2) must always be assessed in the context of the particular circumstances in which it occurred. In some cases, the giving of notice after a tentative agreement has been reached may well give rise to an inference that the employer has been using the freedom provided by section 43 to shelter behind an employers' organization and thereby avoid its obligation to bargain. In other cases, however, the employer may have been prepared from the outset to enter into a collective agreement, but may find itself unable to agree to a particular provision or group of provisions which it had not anticipated would be included in the collective agreement and which give(s) insufficient recognition of its special circumstances. If the Board were to hold an employer in this type of situation in violation of section 14, it would be interpreting the section so as to impose upon the parties a framework for collective bargaining which the Legislature has not seen fit to establish.

13. The Board has already dealt with a case in which an employer could be said to have bargained through an employers' organization without a bona fide intention of concluding a collective agreement. In *Milnes Fuel Oil Limited*, (Board File No. 1461-76-U, January 26, 1977, unreported) the respondent employer bargained through an employers' organization to a tentative agreement and then applied for conciliation, thus indicating an intention to return to single employer bargaining. This conduct occurred against the background of a pattern of activity which the complainant alleged was evidence of an attempt by the employer to unlawfully rid itself of the trade union and which the Board concluded was in violation of sections 56, 58(a), (b), and (c), 59(1), 61 and 70 of The Labour Relations Act, and in respect of which the Board issued an Order directing the employer to cease and desist from all activities designed to defeat the rights of the union and/or the employees under the Act. Because the employer in *Milnes* had not notified the union pursuant to section 43(2) that it would not be bound by the collective agreement, the Board did not find the employer in violation of section 14. However, it is clear from a reading of the decision that the Board would have found bad faith bargaining had such notice been delivered.



14. The Board is not prepared on the basis of the evidence before it to draw the inference that Henderson has hidden behind the Council to avoid its obligation to bargain with the complainant. Nor are we prepared to conclude that Henderson continued under the Council's umbrella after it learned that the new collective agreement between the Council and the complainant would contain provisions to which it could not agree. This latter type of conduct would also, in our view, constitute a violation of section 14, since it would have needlessly forestalled the commencement of direct negotiations between the parties.

15. The evidence establishes that Henderson has negotiated seven consecutive collective agreements with the Council. Moreover, there is no evidence that it has engaged in anti-union activity of any kind. This is in vivid contrast to the situation which existed in *Milnes*.

16. The Board is concerned that Henderson's letter of May 6th, wherein it stated, among other things, that it wished to "commence bargaining", may reveal an intention on the part of Henderson to ignore completely the bargaining between the complainant and the Council, a course of conduct which would indeed leave Henderson's bona fides open to question. We prefer, however, to construe the letter as no more than an attempt on the part of Henderson's solicitors to prevent a resort to strike action by the complainant before the parties have had an opportunity to reach an agreement on those items of the collective agreement between the Council and the complainant which Henderson finds itself unable to accept.

17. Our conclusion is that Henderson is not bound by the collective agreement between the Council and the complainant entered into on April 25th, 1977 and that Henderson has not violated section 14 of The Labour Relations Act.

18. The complainant and Henderson must now meet and engage in direct negotiations with a view to concluding a collective agreement. These negotiations must take place against the background of the bargaining which has already taken place between the complainant and the Council, which, until its bargaining authority was revoked, was authorized to bargain on Henderson's behalf.

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**1065-76-U Federation of Community Agency Staffs, (Complainant), v. Catholic Children's Aid Society of Metropolitan Toronto, (Respondent).**

**Employee – Whether supervisor of volunteers exercises managerial functions – Whether supervisor of volunteers is an independent contractor.**

**BEFORE:** A. L. Haladner, Vice-Chairman, and Board Members H. Simon and J. E. C. Robinson.

**DECISION OF THE BOARD:** July 12, 1977

1. In an interim decision dated May 10, 1977 the Board ruled that Mrs. Jessie Cooper and Mrs. Joan McAlmont were employees of the respondent within the meaning of The Labour Relations Act, and thus covered by the Act.

2. At the time of the conduct complained of, Mrs. McAlmont worked for the respondent as a volunteer project worker. Her job consisted of interviewing and assessing the suitability of volunteers for positions in the family services department, orienting the volunteers to the jobs they would be performing, placing volunteers with social workers, and keeping in touch with the volunteers and social workers to see how things were going. She also advised social workers of the volunteer programs that were available and attempted to orient them to the use of the programs. Mrs. McAlmont was supervised by Elsie Toguri, with whom she had regularly scheduled meetings and to whom she made reports when requested. Mrs. McAlmont worked a fifteen hour week and was paid \$200.00 every two weeks.

3. At the time of the conduct complained of, Mrs. Jessie Cooper worked for the respondent as a part-time child care worker, specifically with children in families serviced by the family services department. She was responsible to the unit supervisor of family services for carrying out the duties and responsibilities of her position, and had regularly scheduled supervision periods every week as did the other family service workers. She worked an eight-hour day, three times a week, and was paid on the basis of the hours she worked.

4. At the hearing, the respondent contended that Mrs. McAlmont was not an employee within the meaning of The Labour Relations Act as her relationship more closely resembled that of an independent contractor than the relationship of an employee. In the alternative, it contended that Mrs. McAlmont exercised managerial functions within the meaning of section 1(3)(b) of the Act.

5. At the hearing, the respondent contended that Mrs. Cooper was not an employee within the meaning of the Act insofar as her relationship more closely resembled that of an independent contractor than the relationship of an employee.

6. Having regard to the Board's interim decision that Mrs. McAlmont and Mrs. Cooper were employees within the meaning of the Act, the respondent now takes the position that the two employees are dependent contractors within the meaning of section 1(1)-(ga) of the Act.

7. Dealing first with the question of whether Mrs. McAlmont exercises managerial functions – to the extent that Mrs. McAlmont has any supervisory duties, these duties are in respect of non-employees, namely volunteers. The Board has, therefore, focused primarily on the criterion of independent decision-making responsibility.

8. In the Board's view, the degree of independent control and direction which Mrs. McAlmont exercised over the volunteer program falls far short of that necessary to exclude her from the collective bargaining process under section 1(3)(b) of the Act. In this regard, the Board notes that:

- (a) Although Mrs. McAlmont played a major role in the initial decision as to whether or not a volunteer is suitable for work in the family services department, and could reject volunteers who were clearly unsuitable, she had no independent authority to decide whether or where a volunteer would work. Her role in the placement of volunteers was to attempt to place suitable volunteers

with social workers upon request, and to act as liaison with the social worker so that the social worker would know what volunteers were available.

- (b) Although she kept herself informed of the problems that social workers were having with the volunteers, Mrs. McAlmont did not exercise any control over the activities of the social workers, either in their own right, or in their relationship with the volunteers.
- (c) Although Mrs. McAlmont was given considerable responsibility for the development of the initial orientation program for volunteers, she could not make any significant changes in the program without discussing them with her supervisor. It should be noted here that Mrs. McAlmont was pretty much excluded from discussions of agency policy, and was dependent for what came through to her upon Mrs. Toguri. As well, Mrs. McAlmont had no authority to commit the respondent to the purchase of materials or to make monetary expenditures on its behalf.
- (d) There was no evidence that Mrs. McAlmont had authority to assess the performance of volunteers after they had been placed on the family services roster or that she had authority to terminate volunteers whose performance was unsatisfactory.

9. The Board finds that Mrs. McAlmont is not a person who exercises managerial functions within the meaning of The Labour Relations Act.

10. We now turn to the question of whether Mrs. McAlmont and Mrs. Cooper have any status as entrepreneurs such that they can be considered as independent contractors and thus excluded from coverage under the Act, or dependent contractors within the meaning of section 1(1)(ga) of the Act and thus distinct from "ordinary" employees.

11. In *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 879, Leonard Schultz, Luigi Pasinato & Adbo Contracting Company Ltd.*, Board File No. 1295-76-U, the Board has this to say about the problem of distinguishing between the individual worker and the true entrepreneur:

"There exists an economic spectrum – coloured at one end by the true entrepreneur and at the other end by the individual worker. These two points of the spectrum can be identified clearly. The businessman who sells goods, and employs others to produce these goods, is clearly not entitled to use the *Labour Relations Act* for the purpose of forming a combination with other businessmen. On the other hand, it is clear that the worker who supplies only his own labour to an employer is entitled to organize with other workers under the Act."

12. Before the inclusion of the dependent contractor provisions in The Labour Relations Act, the question of whether a person falling within the shaded area of the economic spectrum was covered by the Act had to be framed in terms of whether a person was an em-



ployee or an independent contractor. The Board has not as yet established the criteria it will use to determine whether persons covered by the Act are dependent contractors as opposed to ordinary employees now that the Act has laid down a new point of departure for distinguishing between the individual worker and the true entrepreneur. However, whether the criterion is that of the four-fold test as set out in the *Montreal Locomotive Works Ltd.* case, [1947] 1 D.L.R. 101; the statutory purpose test or the small businessman test as set out in the *Livingston Transportation Ltd.* case, [1972] OLRB Rep. May 488; or whether the criterion is that of the community of interest which the persons whose status is in question share with the other employees of the employer, it is clear that Mrs. McAlmont and Mrs. Cooper are not dependent contractors (much less independent contractors) within the meaning of The Labour Relations Act.

13. The evidence establishes that, for the period of employment in question, both McAlmont and Cooper worked under the direction and supervision of the respondent, supplied only their own labour, were paid a set wage, computed hourly, did not derive income from any other source, and had no say in the establishment of the terms and conditions under which they worked. In no sense can they be considered as falling within the shaded area of the economic spectrum.

14. The Board finds that Mrs. McAlmont and Mrs. Cooper are neither independent, nor dependent contractors within the meaning of section 1(1)(ga) of the Act.

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**0503-77-U C & C Yachts Manufacturing Limited, (Complainant), v. Carpenters Local Union 2737, Arthur Varty, Zigmunt Soyka, Peter Clark, Albert Bending, Gary Page, Brian Chesham, Fred Koidl, Fred Hopper, Edward Guay, and Albert Wiens, (Respondents).**

**Strike – Whether concerted refusal to work overtime is a strike – Effect of Employment Standards Act provisions concerning overtime.**

**BEFORE:** M. G. Picher, Vice-Chairman.

**APPEARANCES:** R. C. Filion and P. S. Taylor for the complainant; Stanley Simpson, A. Varty and Zigmunt Soyka for the respondents.

**DECISION OF THE BOARD:** July 25, 1977

1. This is a complaint under section 82 of The Labour Relations Act whereby a declaration and cease and desist order are requested by the employer in respect of an alleged unlawful strike. The complaint was heard at St. Catharines on June 28, 1977.

2. The complainant employer manufactures sailboats at Niagara-on-the-Lake, Ontario. The respondent trade union represents the plant's production employees under the terms of a collective agreement which will expire July 31, 1977.

3. The evidence of the complainant, adduced through the testimony of Mr. Peter S. Taylor, the employer's industrial relations manager, is essentially unchallenged, as the union and individual respondents who appeared adduced no evidence.

4. In recent weeks the employer and union have been engaged in bargaining with a view to renewing their collective agreement. Negotiation meetings were held on the 2nd, 10th, 16th and 22nd of June 1977. At the meeting of the 16th Mr. Arthur Varty, the business representative of the union and a member of its bargaining committee, requested that all overtime work be discontinued for the duration of negotiations. The employer refused.

5. The refusal is not surprising. According to Mr. Taylor the nature of the employer's business renders overtime work essential at this time of year. The month of June is a busy period for the employer with a heightened demand for the delivery of finished boats for the new sailing season. The need for overtime has been further increased this year by the employer's growing involvement in the manufacture and sale of rigging equipment to others engaged in boat manufacturing and repairs. The unchallenged evidence is that the employer's competitiveness in that line depends to a great extent on its ability to provide early delivery which in turn necessitates overtime production. This is especially so during the sailing season when the call is greatest for repairs to rigging equipment. In addition, overtime has become more important to the employer this year by virtue of the introduction of new techniques in fibreglassing and, as well, by the need to complete first production of a new model in order to have it tested in sufficient samples to make it marketable at post-season boat shows. Lastly, the evidence establishes that overtime is essential to the employer for the repair and ongoing maintenance of its production machinery and for the implementation of plant, fire and safety measures. While overtime is not essential on a year-round basis in the plant, it is vital in the spring and early summer. The importance of overtime was communicated to the union as the reason for refusing Mr. Varty's request for its elimination. Mr. Varty's reply was that overtime would be unilaterally withdrawn by the union if the employer did not eliminate it voluntarily.

6. On June 21, 1977 Mr. Zigmunt Soyka, the president of the respondent union, advised Mr. Taylor, in the presence of the respondents Page and Chesham, that on the evening prior a meeting of the union was held at which it was decided that no further overtime would be worked during contract negotiations and that penalties would be levied by the union against those who did not comply with the boycott. At the negotiation meeting of the 22nd, when Mr. Taylor threatened a complaint to this Board regarding the threatened overtime boycott, neither Mr. Soyka, Mr. Varty, Mr. Chesham nor Mr. Page, all of whom were present on behalf of the union as members of its negotiating committee, either withdrew or qualified the union's position on the withholding of overtime. Thereafter, certain exceptions were made by the union to allow a small number of employees to work overtime, including two maintenance men, one person employed in fire and safety control and two storekeepers attending a computer orientation course after hours. Otherwise, from June 21st forward, no overtime was worked. In the three weeks previous, logged overtime within the bargaining unit of 190 employees had averaged about 430 man hours per week. The employer took the union at its word and apparently did not request any employees to work overtime after June 21, 1977. It consistently took the position that the boycott was unlawful.

7. There is no doubt that on an individual basis employees in the plant are not required to work overtime when requested to do so. That is common ground and is evident

from the wording of Article 23.02 of the collective agreement. The whole of Article 23 is as follows:

## ARTICLE 23

### Overtime

- 23.01 (a) Premium overtime at time and one half shall be paid for all work performed:
- (i) in excess of:
    - (aa) eight (8) hours per day;
    - (bb) forty (40) hours per week Monday through Friday;
  - (ii) all work performed on Saturday which is not part of a regular shift;
- (b) Premium overtime at double time shall be paid for all work performed on Sunday, which is not part of a regular shift.
- (c) Neither overtime premiums nor credits for overtime will be pyramided.
- 23.02 The present practice of canvassing employees as to overtime assignments will be continued.

8. In this case it is not disputed that the union was not in a legal strike position as at all material times the collective agreement continued in operation at the time of the union's actions (see section 63(1) of the Act).

9. This Board has in the past found that the concerted withholding of overtime to limit an employer's output is a strike within the meaning of the Act and that the untimely imposition of that sanction is an unlawful strike contrary to section 63 of the Act. (See *Beaver Shirt and Sportswear et al*, [1964] OLRB Rep. July 187; *Hydro-Electric Power Commission of Ontario*, [1969] OLRB Rep. May 169, upheld on review 70 CLLC ¶14,031 (C.A.); *Mobil Paint Company*, [1974] OLRB Rep. Oct. 650; and *Domtar Packaging Limited*, [1974] OLRB Rep. Dec. 900.).

10. The term "strike" is defined as follows by section 1(1)(m) of The Labour Relations Act:

1. – (1) In this Act,

- (m) "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees designed to restrict or limit output.



11. Section 82 of the Act provides the remedy to an employer that is the victim not only of a strike but of any act that amounts to an authorization or a threat to call or authorize an unlawful strike. The section is as follows:

82. Where, on the complaint of a trade union, council of trade unions, employer or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened to engage in an unlawful strike or that employees engaged in or threatened to engage in an unlawful strike, the Board may so declare and, in addition, in its discretion, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

12. Counsel for the respondent points out that as the employer has taken the union's announcement at face value and has not requested employees to work overtime no refusal to work overtime has been proved and no strike as such has been established. But even if a finding of a strike does require proof of an actual refusal to work in the face of a request by the employer, that does not dispose of this case. Here the complaint is grounded in the threat and authorization of a strike by the union through its officers and members. The authorization, threat and encouragement of a strike that would be unlawful are of themselves unlawful acts within section 82. It is therefore unnecessary for the Board to decide whether in this case the communication by a number of employees through their bargaining agent of their intention to refuse to work overtime is in itself a refusal to work overtime that amounts to a strike.

13. The Board is satisfied that there has been the threat, authorization, counselling and encouragement of a strike within the meaning of section 1(1)(m) of the Act on the part of the respondent union, Arthur Varty, Zigmunt Soyka, Gary Page and Brian Chesham. All of the named individuals are officers or agents of the trade union who were present at the meetings with the employer on June 21st and 22nd, 1977. By the admission of Mr. Soyka contained in the testimony of Mr. Taylor, they participated in or acquiesced in the calling and authorization of the strike at the meeting of the union on June 20, 1977. By the evidence of Mr. Taylor, which the Board accepts, Mr. Soyka and Mr. Varty communicated the threat of a strike to the employer in the presence of Chesham and Page who apparently acquiesced in the threat.

14. The next question is whether the authorization and threat of strike was lawful. It is clear that the union and its officers threatened a concerted withholding of overtime at a time when they could not do so within the terms of section 63(1) of the Act. Counsel for the respondent submits, however, that it was not unlawful, or alternatively, that if it was, this is an appropriate case for the Board to exercise its discretion to refuse to issue a declaration or a cease and desist order.

15. The respondent argues that the scheduling of overtime work by this employer would be contrary to the terms of the Employment Standards Act since the employer has no

permit to do so from the Director of Employment Standards. He submits that by promoting a refusal to work overtime the trade union is in effect enforcing the duty of its members to refrain from breaches of the Employment Standards Act.

16. The respondent does not suggest, as indeed on the evidence it could not, that the strike threat in this case was in any way so piously motivated. Clearly, leverage in bargaining was the only motive as Mr. Varty and Mr. Soyka made it clear that all restrictions on overtime would be lifted as soon as a new collective agreement was agreed upon. Counsel for the union submits that notwithstanding the motive for the withholding of overtime, this Board should not declare the threatened withholding to be unlawful or order that the union and its officers cease and desist since to do so would be tantamount to ordering the union to cease preventing the commission of unlawful acts by its members.

17. We turn to consider the merits of that argument. The Employment Standards Act is a statute of general application that imposes minimum standards of terms and conditions of employment in all employment relationships, including employment relationships governed by collective bargaining. Through the Act and the Regulations made under it, the Legislature has introduced into the workplace certain minimum standards relating to, among other things, matters such as wages, hours of work, vacation pay and termination notice.

18. The Act contains the following definition:

1. In this Act,

(e) “employment standard” means a requirement imposed upon an employer in favour of an employee by this Act or the regulations.

19. The Act recognizes that standards higher than the standards in the Act and Regulations may be agreed upon and states that when they are agreed upon, higher standards shall prevail:

4. – (1) An employment standard shall be deemed a minimum requirement only.

(2) A right, benefit, term or condition of employment under a contract, oral or written, express or implied, or under any other Act or any schedule, order or regulation made thereunder that provides in favour of an employee a higher remuneration in money, a greater right or benefit or lesser hours of work than the requirement imposed by an employment standard shall prevail over an employment standard.

5. – (1) Where terms or conditions of employment in a collective agreement as defined in *The Labour Relations Act* confer a higher remuneration in money or a greater right or benefit for an employee respecting holidays than the provisions of Part VII, the terms or conditions of employment shall prevail.

(2) Where the Director finds that terms or conditions of employment in a contract of employment oral or written, express or implied, that are not in a collective agreement confer a higher remuneration in money or a greater right or benefit for an employee respecting holidays than the provisions of Part VII, the terms or conditions of employment shall prevail.

20. Section 17 of the Act sets the permissible maximum of working hours in the day and the week.

17. Except as otherwise provided in this Part, and subject to any schedule in force under *The Industrial Standards Act*, the hours of work of an employee shall not exceed eight in the day and forty-eight in the week.

Any work in excess of that maximum number of hours requires permission. Sections 18, 20 and 21 provide, in part:

18. An employer may, with the approval of the Director, and upon such terms and conditions as the Director prescribes, adopt a regular day of work in excess of eight hours but not in excess of twelve hours, provided that the total hours of work of each employee shall not exceed forty-eight hours in a week.

20. – (1) The Director may issue a permit authorizing hours of work in excess of those prescribed by section 17 or approved under section 18 ...

(3) The issuance of a permit under this section does not require an employee to work any hours in excess of those prescribed by section 17 or approved under section 18 without the consent or agreement of the employee or his agent to hours in excess of eight in the day or forty-eight in the week.

21. Except as otherwise provided in this Part, no employer may require or permit work, and no employee may work or agree to work, any hours that exceed the maximum hours established under this Act.

21. Section 59 of the Act makes it an offence punishable on summary conviction for any person to breach any provision of the Act. Any prosecution must be on consent of the Director of Employment Standards.

22. In support of its argument the union cited the decision of the Supreme Court of Canada in *McLeod v. Egan*, (1974) 46 D.L.R. (3d) 150. In that case an employer had a permit to schedule work beyond forty-eight hours in one week. An employee was disciplined by reason of his refusal to work overtime in excess of forty-eight hours in a week. A decision of the Supreme Court of Ontario quashing an arbitration award upholding the discipline was upheld by the Supreme Court of Canada. The Court unanimously held that nothing in the collective agreement could be construed as amounting to the consent required by section 11(2) [now section 20(3)] of the Act. In other words, the employee was free to refuse to



work overtime in excess of forty-eight hours per week and could not be disciplined for refusing to do so.

23. Counsel for the union argues that the union in this case is acting as statutory agent to withhold the consent of the employees to the performance of overtime beyond the statutory maximum. He submits that it has, quite apart from its motive, in effect withheld its consent as it is entitled to do under section 20(3) of the Employment Standards Act.

24. Central to the union's case is its submission that in this case the statutory maximum of hours in a week beyond which a permit for overtime is required is the 40-hour maximum contained in the collective agreement and not the 48-hour maximum in section 17 of the Employment Standards Act. This, it argues, is the effect of section 4(2) of the Act, which provides that where a greater benefit is found in a contract of employment that greater benefit shall prevail over an employment standard of lesser benefit.

25. I do not agree.

26. The setting of maximum hours of work in the day or the week is a matter of public policy. That policy is enforced by rendering both employers and employees liable to prosecution for sponsoring or performing work in excess of the maximum hours. The limiting of hours of work by section 17 of the Employment Standards Act is a requirement imposed on employers in favour of employees. That is to say, it is an "employment standard" within the meaning of section 1(e) of that Act.

27. The effect of section 4(2) of the Act is to allow the substitution by oral or written contract, statute or other instrument of standards more favourable to employees. In this case, the more favourable maximum of eight hours in a day and forty in a week are therefore substituted for the less favourable statutory maximum.

28. The exception that allows for a permit or approval of the Director of Employment Standards for work in excess of the maximum standard is not a "requirement in favour of an employee" as that phrase is understood in the Act. Employees are fully protected by the section 17 prohibition of work in excess of eight hours in a day and forty-eight in a week. The approval or permit operates in favour of employers by allowing them to assign work in excess of the statutory maximum with the consent of their employees or their agent. The approval or permit is a saving provision to allow exceptions to the basic statutory standards where certain public policy factors outlined in the Act are found to apply. In other words, the requirement of the approval or permit is not an employment standard as defined in the Act and section 4(2) has no application to it.

29. Moreover, it would be inconsistent with the scheme of the Act, and indeed absurd, to interpret the Act as the union suggests. Section 25 of the Act provides, in part:

25. – (1) Except as otherwise provided in the regulations, where an employee works for an employer in excess of forty-four hours in any week, he shall be paid for each hour worked in excess of forty-four hours overtime pay at an amount not less than one and one-half times the regular rate of the employee.

When that section is read together with section 17, it is clear that the Act contemplates employees working "overtime" between forty-four and forty-eight hours without the requirement of a permit. This Board does not see how the Legislature could reasonably be taken as intending that a permit must be obtained for overtime work for overtime hours in excess of forty in a week, as under the instant collective agreement, but less than forty-eight. There is no sound reason to require a permit where the public policy limit of eight hours in a day and forty-eight in a week is not being exceeded and this Board cannot accept the union's suggestion that the Legislature intended to require an approval or permit in that circumstance.

30. In the circumstances of this case, therefore, the employer, without an approval or permit from the Director of Employment Standards and subject only to the terms of the collective agreement, may request an employee to work hours in excess of forty hours in a week (i.e., overtime within the meaning of the collective agreement) so long as the total of hours worked by an employee does not exceed eight in a day or forty-eight in a week. Within those limits the provision for consent of the employee or his agent in section 20(3) of the Employment Standards Act does not apply. For overtime hours within those limits, the only consent required is the consent provided for in the collective agreement which, by clear implication from the wording of Article 23.02 and the established practice of the parties, is the consent of each employee, given on an individual basis, whenever he or she is requested to work overtime.

31. This Board need not, and does not, in this case decide what the result would be where a union threatens and authorizes the withholding of overtime work where the union is not in a strike position under The Labour Relations Act, where it acts with a concerted intention to limit output, where its threat is solely in respect of overtime in excess of forty-eight hours in the week or eight hours in the day, and where the employer is without a permit from the Director so that the work boycotted would be unlawful under the Employment Standards Act. The question as to whether that Act provides an absolute defence in such a case or would be grounds for this Board to exercise its discretion not to issue a declaration of an unlawful strike or a cease and desist order should await a case where those facts are found.

32. In this case, there is no evidence of the employer requesting any employee to work in excess of eight hours in a day or forty-eight hours in a week. The evidence is, however, that the trade union and its officers have authorized, threatened and ordered a withholding of all overtime work, including overtime work which the employer could lawfully request of the employees and which they could lawfully perform within the provisions of the Employment Standards Act. To that extent there has been the threat of an unlawful strike.

33. At the conclusion of the hearing of this matter on June 28, 1977, the Board gave an oral decision consistent with this finding. It then declared that the trade union and its officers, the respondents Arthur Varty, Zigmunt Soyka, Gary Page and Brian Chesham have threatened, authorized, counselled and encouraged an unlawful strike at the complainant's plant at Niagara-on-the-Lake.

34. At that time the Board also directed that the respondent trade union and its officers and agents Arthur Varty, Zigmunt Soyka, Gary Page and Brian Chesham cease and desist from threatening, authorizing, counselling and encouraging any unlawful strike at the

employer's plant at Niagara-on-the-Lake and further ordered that the trade union and its four officers and agents forthwith take such reasonable steps as would bring this decision to the attention of the employees in the bargaining unit.

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**0322-77-U** James Emanuel Henry, (Complainant), v. Toronto Joint Board Amalgamated Clothing and Textile Workers Union and **Del-Mar Clothes Ltd.**, (*Respondents*).

**Section 79 – Duty of Fair Representation – Whether failure by union officials to instruct employee concerning internal appeal procedures constitutes breach of duty of fair representation – Effect of existence of internal appeal mechanism.**

**BEFORE:** E. Norris Davis, Vice-Chairman and Board Members F. W. Murray and E. Boyer.

**APPEARANCES:** *Ian V. B. Nordheimer for the complainant; Pamela Sigurdson, J. Mitrand, S. Fox, Percy Dolgin and Israel Finkelstein for the respondents.*

**DECISION OF THE BOARD:** July 12, 1977

1. This is an application under section 79 of the Act alleging a violation of section 60 of the Act by the respondent union.

2. The complainant had been employed by Del-Mar Clothes Ltd. for some 4-1/2 years, and at the time of his lay-off on April 1, 1977, which forms the major basis for the present application, was working as a re-cutter. The complainant was recalled to work on May 31, 1977 and continues employed. The Company is engaged in the custom tailored clothing industry and in common with other members of the industry is suffering from a marked lack of demand for its products. The essence of the complainant's case before this Board is that his lay-off was a misapplication of the contract and that the union has discriminated against him, both in not carrying a grievance to arbitration and in other specific areas of representation, and by not informing the complainant of the grievance procedure mechanism and the internal union appeal procedure where the shop committee refuses to carry a grievance.

3. The clause in the existing collective agreement which governs staff reductions is Article 13 and reads as follows:

**ARTICLE 13  
EQUAL DIVISION OF WORK  
AND SENIORITY**

13.1 It is agreed that equal division of work in each section, operation and/or department shall be observed as far as possible.



13.2 During any slack season, the available work shall be divided, insofar as is practicable, equally among all regular employees of the "Employer" in order that continuity of employment may be maintained, unless the "Employer" and the "Union" shall mutually agree upon a lay-off and the conditions applicable thereto.

13.3 If it shall become necessary for the "Employer" to reduce its forces, the "Employer" and the "Union" shall mutually agree upon a lay-off and the conditions applicable thereto, using seniority in a section, operation and/or department as a basis; if the "Employer", after such lay-off shall again restore its forces, those employees laid off shall be re-employed in the order of their seniority before any new employees are hired. Practicality shall be a consideration in implementing this section.

We are told by witnesses called by the union, including management officials, that the nature of the fine clothes industry is such that in the organization of work emphasis is placed on the division of labour into specialized skills breaking the job down into coherent elements and that because of the training time involved in learning each of the specialized operations, the shops do not make a practice of transferring employees between such specialized operations. It was also established that in reductions in staff it is done by seniority within the section and always has been: There is no "bumping" procedure in this industry and this may result in employees being laid off even though they have more years of service with the employer than employees who are retained. It was not disputed that there are presently 12 employees in lay-off status who have more seniority than the complainant who is at work.

4. The Board was also told that if there was a change in the entire nature of a shop, the union tries to be as equitable as possible within the limitations but "you can't shuffle people around without destroying the whole shop". The union denies – and we accept – that there are different rules for "temporary" and for "permanent" lay-offs.

5. The current application of lay-off procedures has been in force for some decades. In the instant case, the complainant was the junior man in the "re-cutting section" and was laid off for lack of work in that section. It is his contention that re-cutting was done by other employees not normally re-cutting during his lay-off – and while the evidence is somewhat confused and contradictory, it is our conclusion that this cannot be substantiated. It is also his contention that the "re-cutting section" includes "alterations" but we must accept the contrary evidence of the Foreman, the Production Manager and the Shop Chairman.

6. Counsel for the complainant also argues that while the established interpretation of Article 13 may be to lay-off in seniority by sections, the language would permit a different interpretation. We express no opinion in that regard other than to point out that the evidence establishes long standing uniform application of this Article consistent with the application to the complainant's case and that hardly gives rise to a successful allegation of "failure to fairly represent".

7. The essence of the complainant's case is that despite the overwhelming evidence of his lay-off having been within well defined and long practiced usage, he was the subject

of discrimination by the union and cites in support of such conclusion a number of incidents other than the lay-off in which he did not secure fair representation and which must be dealt with individually. These are:

- a) In late January 1977 the complainant was transferred to basting linings because of the declining work in re-cut. This was a piece-work job and which, in the words of the complainant, he "never really wanted to do" – the evidence also is that his earnings while so assigned were about \$1.00 per hour more than his day rate. He was on this job for eight weeks (at which time the job was mechanized) and according to his evidence he was short-changed in his pay calculations which became the subject of weekly complaints by him, both to the Paymaster and to Johnny Mitrano, the Business Agent. Mitrano's evidence was that as soon as Henry complained to him (the same day) he talked to the Paymaster who agreed that Henry was right but that the Production Manager would not agree. Mitrano went to the Production Manager (same day) who wouldn't agree to pay and Mitrano immediately consulted his superior (Fox). Fox and Mitrano returned to the shop, talked with the Production Manager and secured a complete settlement. Henry's comment at that time was "Johnny that's the way to work. Thank you very much". It was suggested by the complainant that there was a difference in Fox's testimony and that of Mitrano, as to the timing of handling the complaint; it is our finding that Fox stated that he and Mitrano had gone to the plant the same day that he was approached – although he couldn't be sure that Henry's conversation with Mitrano had not been a day or two earlier.

The complainant denies that he sought to file a grievance over the change in job to a machine job.

We find he was fairly represented in this matter.

- b) The complainant states that in connection with the lay-off he had been given to understand that this situation was different because it was a temporary and not a permanent lay-off and that he sought to have the difference between the two types defined without success. He testified that the last time he tried for an explanation, Mitrano hung up in his ear.

Fox, Canadian Director of the union testified that a shop meeting was held on March 29, 1977 at which time members were informed of the bad condition of the whole industry and the particular need of Del-mar to improve efficiencies which would probably mean they would need fewer people. He also testified that he had had several conversations with Henry: in his words "I explained. I tried to be as explicit as I could that he was in a section doing re-cuts, that there were two people there and that was more

than needed. We do not have a bumping procedure. He felt that was not right but that's the way it is." He further testified, "I never suggested there was a difference between temporary and permanent lay-offs. We simply have procedures for lay-offs" and that Henry raised the question of discrimination which Fox "felt was unwarranted and I told him so. Henry wanted me to give him a job at the expense of someone else".

Matrmia, Acting Manager of the Joint Board, testified that he had had two conversations with Henry: that he had looked into the matter of the contract and could find nothing irregular. Matrmia testified that he tried to explain to Henry how the contract operated but couldn't get through because regardless of what he said, Henry's reply was "that's not the reason, I know what the reason is. The reason is because I'm coloured". Matrmia states the conversation ended on a friendly note and Henry thanked him for being "so understanding".

Mitrano, Business Agent for the union, states that he explained to Henry how the contract worked and that in his last conversation on the telephone he did hang up on Henry after twenty-five minutes of conversation and after Henry had said, "you know Johnny, if I was Italian you'd give me a job". Mitrano's reply was, "the other guy is Italian and he's out".

We accept the evidence as establishing that at least three union officials took more than reasonable time to explain to Henry the working of the contract and the lay-off procedures, and that if there was any confusion in Henry's mind about temporary and permanent lay-offs, it was not because the respondent had not tried to set the matter right.

We find the union's treatment of Henry to be in the normal handling with no evidence of discrimination.

- c) The complainant alleges that despite the re-assurances he had had from union officials that he would be the first man to be recalled, that he learned while he was on lay-off that a fellow employee named Genaro who had also been laid off was back at work. Henry called Matrmia, the Assistant Manager of the union to enquire. It was first denied but Genaro walked into the office while the conversation was proceeding, Matrmia talked to Genaro and then replied to Henry that "yes the guy was working there but it won't happen again". According to Henry he then asked Matrmia why the foreman hadn't called him back and Matrmia is said to have responded "Henry, I don't know. I know there is prejudice exists but there isn't any in the union".



Matrmia under cross-examination denied that he had said "I know there is prejudice exists but there isn't any in the union" and that the text of the conversation was that Henry said "do you believe there is no discrimination in this world?" to which Matrmia replied, "I'm not going to say there is none in the world but certainly none in this union".

Under cross-examination, Henry stated that Matrmia used the word "prejudice" and "I never used it. I don't know what discrimination is".

The Board declines to evaluate the total import of this conversation inasmuch as it does not bear in any way on the respondent union and is an allegation of impropriety against the employer which is not to be tried in these proceedings. The complained of occurrence took place without the knowledge of the union. The union when it became aware of the matter took a firm stand against it.

The Board finds that there is nothing in this incident to suggest that the union acted discriminatorily in representing Henry.

8. The board in its finding that the allegation of discrimination by the union cannot be supported relies not only on the foregoing recitals but also on the following established in the evidence:

- a) Throughout the period of Henry's lay-off the Union Business Agent (both by his own evidence and corroborated by the foreman) continued to seek weekly for a possible vacancy which would permit Henry to be recalled.
- b) Henry is not the only member of his race employed by the Company. One other coloured man has been there for thirty years. Additionally, there are persons of other racial and ethnic origins employed.
- c) The statement of the Canadian Director of the Union under cross-examination when being asked about discrimination replied "the history of our union is overtly and specifically against such situations. In this particular situation I saw no evidence his problems were based on that".

9. Let us now turn to the question as to whether the union's failure to carry a grievance through to arbitration can be considered to be not fair representation or in the language of section 60 of the Act, to have been "arbitrary, discriminatory or in bad faith".

10. This Board has many time stated that in its opinion the total collective bargaining relationship does not require a bargaining agent to process every individual grievance on request of the alleged grievor in order to avoid any breach of section 60 of the Act. It is

sufficient that the bargaining agent has not acted discriminatorily (and we have found that such was not the case here) or arbitrarily by not turning its mind to the problem. We can think of few cases of potential grievance in which the matter was so intensively and exhaustively examined and discussed at various levels of union staff as in this case. There can be no conclusion of arbitrary treatment. The complainant's argument that he had not been instructed as to the mechanics of the grievance procedure we frankly view as fencing at windmills. The facts are that union officials were completely satisfied for good and valid reasons that no basis could be found for a successful grievance and that none would be carried; further discussion about how it would be carried would clearly be a sterile discussion.

11. For the Board to find that the union here was acting in bad faith, we would have to first conclude that the union was in some manner only engaging in some sort of charade designed to frustrate the complainant's legitimate rights of representation. We must say forcefully that there is a complete absence of any evidence which could lead to such a conclusion.

12. There remains one further matter of argument which must be considered and that is the admitted non-discussion with the complainant of the mechanisms available within the union's internal structure to a member of the union who wishes to have an interim decision of a local official reviewed. In evidence, it was established that there is such an Appeal Procedure in this union and that it consists of an appeal first to the General Executive Board and then to the Convention. It was also established in evidence that no effort was made by union officials to instruct Henry in this procedure – nor was any enquiry made by Henry as to appeal avenues.

13. The Board heard no evidence of what may be the general communications program of the union to ensure that members are aware of the terms of the union constitution, including, as here, the avenues of appeal – nor do we think in general that it is an appropriate matter for this Board to inject itself into. Suffice it to say, however, that it is the Board's policy that where such internal appeal mechanisms do effectively exist that the Board will consider any application to it under section 60 based on the failure of the union to carry a grievance to be premature if, in fact, the complainant has not exhausted the avenues available within the organization of which he is a member. The matter was not raised by the respondent as a bar in this case and the Board makes no decision thereon.

14. The application is dismissed.

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**0302-77-M** Stan Babad, (Complainant), v. **Sunnybrook Medical Centre** and **Sunnybrook Hospital Employees' Union Local 777** (*Respondents*).

**Section 79 – Duty of Fair Representation – Whether individual employee may carry forward a grievance where trade union refuses to do so.**

**BEFORE:** E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

**APPEARANCES:** *Ross Dunsmore and Carol Boettcher for the employer; H. Goldblatt, Fitzroy Kelly and P. W. Tuck for the trade union; Michael F. Smith for the employee/applicant.*

**DECISION OF THE BOARD; July 12, 1977**

1. This is a reference made by the Minister to The Ontario Labour Relations Board under section 96 of the Act. The question which the Board is asked to answer is whether the Minister has authority under The Labour Relations Act to appoint a person to constitute a Board of Arbitration as is requested by the complainant in this case.
2. On February 22, 1977, the applicant, Stan Babad, was discharged by the Sunnybrook Medical Centre and filed a grievance as provided for by the Collective Agreement between Sunnybrook Hospital and Sunnybrook Hospital Employees Union, Local 777, which agreement commenced to operate April 1, 1976 and continues to March 31, 1978.
3. A meeting was held on March 4, 1977 between union representatives and the Director of Personnel for the hospital as provided by the Collective Agreement, Article 9.03 step 3. On March 10th the Director of Personnel upheld the discharge and denied the grievance and Babad was so informed by telephone by the union. On March 14th the Union Grievance Committee met with the International Vice-President of the union and unanimously decided against carrying the grievance to arbitration. This decision was communicated to Babad by letter on March 18 and the Company notified in writing by the union that the grievance was withdrawn.
4. In the meantime, on March 17, Babad, by letter addressed to the employer, served notice of his desire to process the grievance to arbitration, and nominated a Mr. Charles Roach to the proposed Arbitration Board. Babad provided the union business agent with a copy of his letter to the employer together with a covering letter.
5. The question, therefore, is whether Babad has status to carry this grievance to arbitration in the face of the union's decision not to do so. The Labour Relations Act itself does not confer status on anyone to carry a grievance to arbitration other than "parties" to a collective agreement. If such status does exist in this case, it must be found to arise out of the applicable Collective Agreement, and particularly in respect to Articles 9 and 10 of the Agreement which read as follows:

**ARTICLE 9**  
**Complaints and Grievances**

9.01 Either the employer, the union or any employee has the right to lodge a grievance with respect to any matter arising out of the interpretation, application or alleged violation of this Agreement.



9.02 It is the mutual desire of the parties hereto that complaints of the Employer or of the employee shall be adjusted as equitably as possible, and it is understood that an employee has no grievance until he has first given his supervisor an opportunity to adjust his complaint.

9.03 If an employee has an unsettled complaint within the terms of this Agreement, it may be taken up as a grievance within five (5) working days after the circumstances giving rise to the grievance occur, in the following manner and sequence:

**Step 1:**

Between the aggrieved employee, who may be accompanied by his shop steward and his supervisor. The grievance shall be submitted in writing and the decision given in writing, within three (3) full working days. Failing a settlement the grievance may be processed to the next step, within five (5) full working days of the supervisor's decision.

**Step 2:**

By the employee, the shop steward and the Department Director. The discussion at this step will be held within five (5) full working days and the decision of the Director shall be given, in writing, within four (4) working days. Failing a settlement the grievance may be processed to the next step within five (5) full working days following the decision of Step 2.

**Step 3:**

By conference between representatives of the Union and Director of Personnel for the Hospital, at which time the written record of the grievance shall be submitted and the decision given, in writing, within five (5) full working days.

9.04 Failing the settlement under Step 3 of any difference between the parties arising from the interpretation, application, administration or alleged violation of this Agreement, including any question as to whether a matter is arbitrable, such difference or question may be taken to arbitration as provided in Article 10. If no written request for arbitration is received within ten (10) days after the decision in Step 3 is given, it shall be deemed to have been settled or abandoned.

9.05 Any adjustment arising out of the settlement of any employee's grievance or the grievance of a group of employees under the Grievance or Arbitration procedure shall not be made retroactive before the date it was presented thereunder.

9.06 Saturdays, Sundays and Statutory Holidays will not be counted in determining the time within which any actions is to be taken or completed under the Grievance or Arbitration procedures.

9.07 Any and all time limits fixed by this Article and Article 10 may be at any time extended by written agreement between the Employer and the Union.

9.08 All the decisions arrived at between the Employer and the Union shall be final and binding upon each of them and the employee or employees concerned.

## ARTICLE 10 Arbitration

10.01 When either party requests that any matter be submitted to arbitration as hereinbefore provided, it shall make such request in writing addressed to the other party to this Agreement, and at the same time nominate an arbitrator. Within five (5) full working days thereafter the other party shall nominate an arbitrator provided, however, that if such party fails to nominate an arbitrator as herein required, the Ontario Labour Management Arbitration Commission shall have power to effect such appointment upon application thereto by the party invoking arbitration procedure. The two (2) arbitrators shall attempt to select by agreement a third person to be a member and Chairman of the Arbitration Board. If they are unable to agree upon such a Chairman within a period of three (3) full working days, they may then request the Ontario Labour Management Arbitration Commission to assist them in selecting a Chairman provided that the Chairman shall be selected from other than the Civil Services and shall be chosen having regard to his impartiality his qualifications in interpreting Collective Bargaining Agreements and his familiarity with industrial relations.

10.02 No person may be appointed as an arbitrator who has been involved in an attempt to negotiate or settle the grievance.

10.03 No matter may be submitted to arbitration which has not been properly carried through all previous steps of the Grievance Procedure.

10.04 The Arbitration Board shall not be authorized to make any decision inconsistent with the provisions of this Agreement, nor to alter, modify or amend any part of this Agreement.

10.05 The proceedings of the Arbitration Board will be expedited by the Parties hereto, and the decision of the majority of such Board will be final and binding upon the parties hereto and the employee(s) concerned.

10.06 In dealing with matters of discipline, disciplinary demotion or transfer the conferring parties or the Board of Arbitration shall have power to:

- (a) confirm the Employer's action;

- (b) reverse the Employer's action;
- (c) make any other arrangement which may be deemed just in the opinion of the conferring parties or the Board of Arbitration.

10.07 Each of the parties hereto will bear the fees and expenses of the arbitrator appointed by it, and the parties will jointly bear the fees and expenses of the Chairman of the Arbitration Board.

6. The applicant points out that under Article 9.01 a grievance may be lodged by either the employer, the union or an employee, and that where the grievance is lodged by an employee he *ipso facto* becomes "a party to the grievance". The applicant further argues that such an employee is a party within the usage of that term in Article 9.04 which provides for arbitration in accordance with Article 10.

7. It is the Board's opinion that a reading of Article 9, as a whole, clearly establishes the right of an employee to participate in the grievance process – and to some extent to share in the carrying of a grievance through steps 1 and 2. But it is equally clear that in step 3 it is the parties to the Collective Agreement who are solely involved and the reference in Article 9.04 to a "difference between the parties" is a difference still remaining after step 3 in which only the union and the Company are parties.

8. The case of *McDonald v Air Canada* [1974] CLLC ¶14,205 was put forward as supporting the applicant's contention but in that case the collective agreement specifically provided that

"the employee may throughout this procedure handle the matter on his own behalf if he so desires, including arbitration".

In our opinion where, as here, the union is recognized in Article 2.01 as "the exclusive collective bargaining agent ... for all employees ..." it would require express language elsewhere in the Agreement (as existed in *McDonald v Air Canada*) in order to confer an employee right such as the applicant seeks.

9. Article 10 of the present contract is clearly against the position put forward by the applicant. Article 10.01 sets out,

"When either party requests that any matter be submitted to arbitration ... it shall make such request in writing addressed *to the other party to this Agreement* ...".

Article 10.05 sets out,

"... the decision ... will be final and binding *upon the parties hereto and the employee(s) concerned*".

Article 10.07 provides for the parties to the Agreement to bear the expenses of the Arbitration. Throughout Article 10 it is clear that the entire contemplation of the Article is solely on the parties to the collective agreement.



10. Even if the contract could be interpreted to confer status on the applicant it is our view that Article 9.08 providing that

*“all the decisions arrived at between the Employer and the Union shall be final and binding upon each of them and the employee or employees concerned”*

would preclude such status in this case. The applicant suggested in argument that the actual acceptance of the Company's position was not in fact communicated to the Company until March 18th which was after Babad's letter of March 17th. The argument is that Babad's exercise of right could not be retroactively interfered with. The evidence shows that the union's internal decision had in fact been taken on March 14th and was not engendered by Babad's letter of March 17th. We see nothing in Article 9.08 which, in a case such as this, restricts the bargaining agent's freedom of action to act as the bargaining agent of all employees through withdrawing the grievance.

11. The Board is of the opinion that the applicant has no right under the Collective Agreement to carry a grievance to arbitration and we shall therefore advise the Minister that there is no authority under the Act for the Minister to appoint a person to constitute a Board of Arbitration.

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**0138-77-R The International Union of Bricklayers & Allied Craftsmen Local # 10, (Applicant), v. Stewart & Hinen, (Respondent).**

**Membership evidence – whether certificates of membership must state that dues have been paid.**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

**DECISION OF THE BOARD:** May 5, 1977

1. This is an application for certification in which the applicant filed two certificates of membership. Although dues books signed by the members are generally regarded by the Board as the best proof of membership in a trade union, the Board will also generally accept certificates of membership. However, to be acceptable a certificate of membership must not only state that the employee signing it is a union member, but it must also contain an indication of the month and year for which the employee's most recent dues have been paid. In this case neither of the certificates of membership indicate that any monthly dues have been paid. This being the case the Board finds that no acceptable evidence of membership has been filed in support of the application.

2. Having regard to the foregoing this application is dismissed.
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**0456-77-M Peel Memorial Hospital, (Employer), v. Canadian Union of Operating Engineers, Local 101, (Trade Union).**

**Reference – Conciliation – Collective Agreement – Whether parties renegotiating a collective agreement following an A.I.B. rollback must resort to conciliation.**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members E. Boyer and F. Kean.

**APPEARANCES:** *G.G. Smith and D. MacDougall for the employer; U. McManus and J. Mackey for the trade union.*

**DECISION OF THE BOARD:** July 28, 1977

1. By an application to the Minister dated May 24, 1977 the employer, Peel Memorial Hospital, requested the Minister to appoint a conciliation officer. Pursuant to section 96 of *The Labour Relations Act*, the Minister has referred to the Board the question as to whether or not the Minister has the authority under the Act to appoint a conciliation officer in this instance.

2. The following sections of the Act are relevant in this case in determining whether or not the Minister has the authority to appoint a conciliation officer.

“45. (1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

15. (1) Where notice has been given under section 13 or 45, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

15. (2) Notwithstanding the failure of a trade union to give written notice under section 13 or the failure of either party to give written notice under sections 45 and 111, where the parties have met and bargained, the Minister, upon the request of either party, may appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.”

3. In the ordinary sequence of events it is during the last ninety days of the operation of a collective agreement that either party may give notice to the other of its desire to bargain. Once notice has been given either party may apply to the Minister for the appoint-

ment of a conciliation officer. In circumstances where section 15 notice has not been given the Minister may still appoint a conciliation officer if the parties have met and bargained.

4. The employer, the applicant for the appointment of a conciliation officer, submits that the Memorandum of Settlement signed by the parties on November 24, 1976 and subsequently ratified by each, was a conditional agreement which was not intended to become effective until approval from the Anti-Inflation Board has been obtained. Because approval from the A.I.B. was not forthcoming, the employer contends that no collective agreement exists between the parties and that the Minister, therefore, has the authority to appoint a conciliation officer. The Union of Operating Engineers, on the other hand, argues that the appointment of the conciliator would be untimely because the Memorandum of Settlement became effective upon ratification, was not conditional on A.I.B. approval, and remains in full force and effect.

5. To fill out the sequence of events, the Memorandum of Settlement was submitted to the A.I.B. on April 4, 1977. The parties were notified that the compensation package was larger than could be accepted by the A.I.B. The Anti-Inflation Board informed the parties that the increases should not exceed 8% in the first guideline year and 6% in the second. In view of this Board's decisions in *Croven Limited*, [1977] OLRB Rep. March 162 and *Libby McNeill & Libby of Canada Limited* (Board File No. 1568-76-U), decision dated April 22, 1977 as yet unreported, discussed *infra*) even if the Board accepts the union's argument that the Memorandum of Settlement was not conditional it will then become necessary to determine the effect, if any, of the rollback on the existence of that agreement.

6. We turn then to determine whether prior to the rollback a collective agreement existed between the parties.

7. The employer bases its contention that the Memorandum of Settlement was a conditional rather than final settlement on two paragraphs contained in the Memorandum of Settlement:

"Article 16.01. Wages will be (subject to A.I.B. review as set out below).

	Jan. 1/76	Apr. 1/76	Jan. 1/77
3rd	\$6.65	\$6.84	\$7.17
4th	6.00	6.29	6.62

The Jan. 1/76 increase shall be implemented and paid retroactively for each hour paid since Jan. 1/76. This retroactivity shall also be paid to employees who have left in accordance with the terms of the 'central' arbitration award.

B The settlement shall be submitted to the A.I.B. and pending A.I.B. approval of the overall settlement the Jan. 1/76 increase only will be implemented along with the other items in this memorandum. The Apr. 1/76 and Jan. 1/77 wages will not be implemented until after the A.I.B. decision. After the A.I.B. decision all parties are to meet to work out the implementation of the Apr. 1/76 and Jan. 1/77 wages or alterations thereof."



8. The Board was confronted with a similar conditional provision in the *Silverwood Dairies* case, [1977] OLRB Rep. March 177. In that case the last two terms of the Memorandum of Settlement read as follows:

- “ – This settlement is subject to A.I.B. approval and the employer agrees to recommend the settlement to the A.I.B.
- If any part of this agreement is rolled back by the A.I.B. the parties agree to re-negotiate the method of implementing the roll-back.”

In *Silverwood Dairies* the Board found that the parties had made A.I.B. approval a condition precedent to the operation of the collective agreement. Because the approval of the A.I.B. had not been obtained at the time of the Board's hearing the Board found that no collective agreement existed between the parties at that time.

9. The circumstances of the instant case differ from those in *Silverwood Dairies*. The plain reading of the two paragraphs of the instant Memorandum of Settlement set out above reflects a clear intention to make the collective agreement as a whole immediately operative. Paragraph B specifically provides that the Jan. 1, 1976 increase “will be implemented *along with the other items in this memorandum*” (emphasis added). It is only the implementation of the later two wage increases that was delayed pending a decision of the A.I.B. The parties agree that all provisions of the Memorandum of Settlement are presently being implemented with the exception of the two designated wage increases. The Board finds, therefore, that the Memorandum of Settlement operated as an effective collective agreement between the parties at least until the time of the rollback.

10. We must now consider whether or not the collective agreement continued to exist after the rollback of the agreement by the A.I.B.

11. In *Croven Limited* the Board decided that a collective agreement becomes null and void when it is rolled back by the A.I.B. if the agreement does not sufficiently provide for the manner in which the rollback will be implemented. In reaching its decision the Board was cognizant of the network of trade-offs that are often made in process of negotiating a collective agreement. The settlement of one item or series of items is frequently dependent upon the particular settlement of another item or series of items. The Board recognized that the rollback might cause the parties to set different priorities and make different trade-offs from those deemed appropriate when, during the previous negotiations, the permitted ceiling of the compensation package was thought to be higher. Because of the importance of the compensation package to the agreement as a whole and because the interdependence of the various items of the agreement, the Board found that the imposition of a lower compensation package ceiling destroyed the very essence of the document's character as a collective agreement by destroying its consensual underpinning. The Board was of the opinion that the only effective way to reach a new consensus within the limits prescribed by the rollback was for the parties to be free to bargain a new agreement on the same basis as the original, that is under the duty to bargain in good faith and with the right to resort to a legal strike or lockout if necessary.

12. In *Croven*, the Ontario Labour Relations Board reached a similar decision to that reached by the Canada Labour Board in *Cyprus Anvil*, 76 CLLC ¶16,045. Both of these de-

cisions were followed by this Board in *Libby McNeill & Libby of Canada Limited*. More recently the Labour Relations Board of British Columbia came to a similar conclusion in *Board of School Trustees of School District No. 39 (Vancouver)*, a decision dated May 26, 1977.

13. To ascertain the parameters of the *Croven* decision it must be read in conjunction with another decision of this Board, *Ferranti-Packard Limited*, [1977] OLRB Rep. March 169. In *Ferranti-Packard* the Board found that because of the parties had provided for the eventuality of the rollback in their agreement the A.I.B. rollback did not have the effect of rendering the agreement null and void. Rather than undermining the consensual character of the agreement, the rollback actually brought into operation one of its terms, which reads as follows:

“The Company and the Union agree if the A.I.B. alters the monetary package the parties will negotiate those items to be modified. Failing to implement a satisfactory solution within the required time limits the Company will reduce the package to conform to the A.I.B.”

In discussing the effect of this provision the Board stated at pp. 176 and 177,

“Contemplating this eventuality [a rollback], they have expressly provided a procedure for resolving any differences that arise relating to the implementation of the roll-back. Unlike the situation in *Mole Construction Company* and *Croven Ltd.* where the collective agreement was silent as to the eventuality of a rollback, these parties have agreed in their earlier negotiations that their collective agreement can be amended by the unilateral act of one of the parties. The consensual aspect of their agreement, therefore, did not disappear upon the intervention of the Anti-Inflation Board.”

14. The instant case falls between the situation in *Croven* and *Libby McNeill* where no mention was made of the eventuality of a rollback and the situation in *Ferranti-Packard* where the parties provided a mechanism that would resolve any dispute which might arise in determining the implementation of the rollback.

15. It is common ground between the parties that through article 16.01 and paragraph B of the Memorandum of Settlement they agreed that the full impact of the rollback would be absorbed by adjustments to the wage scale. The parties did not provide, however, *how* the wage scale should be adjusted in order to comply with the rollback or how any dispute that might arise over the implementation of the rollback would be resolved, as was done in *Ferranti-Packard*. The parties could have provided, for example, that they would submit any disputes to a single arbitrator; they could have explicitly provided that in the event of a rollback the wages would be adjusted only to the extent necessary to comply with the maximum percentages established by the A.I.B. and that the scheme of distribution between the levels and as spread out over the various increases would remain in the same proportion and relationship as presently set out in the collective agreement. In other words, if the parties had either foreclosed the possibility of any dispute arising over the implementation of the rollback or if they had provided for a means of resolving any disputes which might arise, then the situation would be comparable to *Ferranti-Packard* and the agreement



would not become null and void. The parties would remain *ad idem* and the consensus necessary for an "agreement" would not be disturbed.

16. Because of the vagueness of the provision relating to the eventuality of the A.I.B. rollback, however, the Board finds that in this instance it has no alternative but to decide that the rollback has disturbed the consensual underpinning of the collective agreement and that it is, therefore, null and void. By providing that the rollback would be absorbed by wages and that the other elements of the compensation package would remain in place, the parties went a long way in circumscribing the potential areas for dispute. The provision was not sufficiently particular, however, to close the door on all implementation disputes that could arise between the parties. In these circumstances, therefore, the parties will be assured of regaining a consensus only if they are put in a position where they can negotiate freely which in this instance means within the framework of *The Hospitals Labour Disputes Arbitration Act*, R.S.O. 1970 c. 208 as amended.

17. In order to determine whether the Minister has the authority in this case to appoint a conciliation officer we must now look at the effect, if any, of the rollback on the conciliation process.

18. In *Libby McNeill* the Board found that when an agreement is rendered void by the operation of a rollback it becomes void as of the moment of the rollback forward and not from the moment of its inception. The agreement is still deemed to have existed prior to the rollback which enables the parties to conduct their affairs in a period of limbo between the commencement of the agreement and the rollback with as much predictability and reliability as possible.

19. The Board stated in *Libby McNeill* that the natural extension of its decision was that the parties would be required to negotiate the replacement agreement in the same manner in which any other successor agreement is negotiated, that is in compliance with the full ambit of negotiation procedures as set out in the Act. While the pre-rollback agreement was unexpectedly rendered void by the operation of the A.I.B., it must still be viewed as any other agreement which operated between the parties and came to an end.

20. The Act provides that when negotiating a new agreement the parties must engage in conciliation (or mediation) prior to being in a legal strike or lockout position. Thus even if the conciliation process was invoked in negotiating the voided agreement, its life must be viewed as having been spent and the parties must proceed through post-rollback conciliation (or mediation) in order to resort to economic sanctions. In some circumstances parties may find that the rollback requires them to make only minor adjustments to their previous agreement. However, in view of the fact that the rollback disrupts the entire compensation package, there may well be other circumstances where the post rollback negotiations will become difficult and strained. In such circumstances, conciliation efforts made in respect of the pre-rollback agreement would be of no more assistance to the post-rollback negotiations than conciliation efforts made in the negotiation of any other type of previous agreement. In our view, therefore, and consistent with the scheme and purpose of the Act, post-rollback conciliation is an essential aspect of the post-rollback negotiation procedures.

21. A rollback by the A.I.B. confronts the Board with an unusual situation and we must consider the procedure that may be followed in order to obtain conciliation services in a post-rollback situation.



22. Section 15(1) of the Act provides that where notice has been given under section 45 the Minister, upon the request of either party, shall appoint a conciliation officer. Notice under section 45 and a request from either party therefore form the foundation for the Minister's appointment. Section 45 provides that either party may give notice to bargain within the period of ninety days before the agreement ceases to operate.

23. Under normal circumstances the parties to a collective agreement are well aware of the agreement's termination date. Prior to the termination, therefore, either party can give the other notice of its desire to bargain. In the rollback situation neither party to the agreement is able to know at any time prior to the rollback that their agreement will be rolled back and rendered void. In a rollback situation, therefore, it is impossible for either party to give notice to bargain during the time set out in section 45, that is, ninety days prior to the termination of the agreement.

24. The question then is raised, whether the time limits set out in section 45 are mandatory or directory. Is it possible, in other words, for a party to give effective notice to bargain under section 45 if the agreement has already ended as in the situation at hand?

25. On at least one occasion the Board has considered the effect of one party giving notice to bargain after the time span prescribed by the Act. In *Backstay Standard Co.*, 46 CLLC ¶16,462 the Board considered section 16(1) of P.C. 1003, *Wartime Labour Relations Regulations* which reads as follows:

"Either party to a collective agreement may, on ten clear days' notice require the other party to enter into negotiations for the renewal of the agreement."

The union gave notice to bargain on January 14, 1946. The agreement expired on January 20, 1946; accordingly less than 10 days clear notice was given to the employer. Notwithstanding the union's failure to give notice within the time period prescribed by the Regulations the Board found that in the circumstances the notice was as effective as if it had fallen within the 10 day time period. The Board explained that the purpose of the requirement of giving notice prior to the termination of the collective agreement was to preserve the continuity of bargaining relations and then went on to say at p. 1168,

"In view of these considerations, we should be loath to hold, even in a case where the notice had been given a few days after the date when an agreement comes to an end, that the union had lost its bargaining rights. It may be that, on a strict, literal interpretation of the Regulations, it can be argued that such notice to be effective must be given prior to the expiry date. However, if we adopt as our guide in construing the Regulations the provisions of section 10 of the *Interpretation Act* – that 'every Act shall be deemed remedial ... and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof' – there is much to be said for holding that the provision as to notice being given prior to the expiry date is directory and not mandatory. It would then follow that, although notice were given after the ex-

piration of an agreement, it would nevertheless still be effective, to secure the bargaining position of the union, provided that the interval between the expiry date and the notice is of short duration and that no question is raised as to the claim of the union to represent the employees."

26. The Ontario Court of Appeal dealt with a similar situation in *Re Lincoln County Roman Catholic Separate School Board and Buchler et al*, [1972] 1 O.R. 854. The case concerned the interpretation of section 27(1) of *The Schools Administration Act*, R.S.O. 1960, c. 361 (now R.S.O. 1970 C. 424 section 26) which reads as follows:

"Upon receipt of an application for a Board of Reference, the Minister shall send notice of the application by registered mail to the other party to the disagreement and shall within thirty days thereof inquire into the disagreement and shall, within the same time,

- (a) refuse to grant the Board of Reference; or
- (b) grant the Board of Reference and direct a judge to act as chairman thereof."

The Minister of Education appointed the Board of Reference after the expiry of the 30 day time period. When the Board was convened the school board objected to the Board's authority to proceed on the basis that the Minister had not acted within the 30 day period. In declining to adopt this argument, Mr. Justice Kelly said at pp. 856 – 857:

"...it is our opinion that the provision in regard to time in the section is directory only and that the jurisdiction of the Minister to make an appointment is not continued to the 30-day period. In this case no allegation is made that the school board was in any way prejudiced by the delay...

It is our view that the appointment which was made within a few days of the expiration of the 30 day period is not defective and that the Board of Reference was not on this account thereby without jurisdiction to discharge the duties committed to it."

27. Section 45 does not say that if either party wants to give notice to bargain it *shall* be within the ninety day period. The purpose of providing a limited period at the end of an agreement for the giving of notice to bargain is to provide stability between the parties for as much of the agreement as possible. At the same time, however, it is desirable to provide a sufficient time prior to the termination of the agreement to enable the parties to conclude, if possible and if desired, a successor agreement. Notice informs the other party and the public that negotiations will follow. Once notice is given certain rights, duties and obligations follow to enable the parties to carry out their negotiations.

28. The rollback and its effect on the collective agreement provides the Board with a unique example of why the time period set out in section 45 must be viewed as directory, not mandatory. If the parties were precluded from being able to give effective section 45 no-

tice to bargain after their collective agreement has been terminated by circumstances far beyond their control, the purpose and scheme of the Act would be frustrated. A panoply of rights, duties and obligations under the Act is triggered by, and only by, the giving of effective section 45 notice to bargain. If section 45 notice cannot be given in these circumstances, then, the negotiation process as envisioned by the Act cannot be set into motion. Unless such notice is found to be effective under section 45 the parties will not be required to bargain in good faith; they will not be assured of an undisturbed atmosphere in which to commence their negotiations because they will become immediately subject to the possibility of displacement and termination applications; they will not be able to obtain the services of a conciliation officer and they will not be able to engage in a legal strike or lockout.

29. In view of the considerations set out above the Board finds that the time period set out in section 45 is directory not mandatory and that notice given after the termination of a collective agreement may be effective notice under section 45 of the Act.

30. In this particular case neither party, since the rollback, has given the other notice of its desire to bargain. Because of the lack of any notice the Minister is not at this time required to appoint a conciliation officer under section 15(1) of the Act.

31. The terms of section 15(2) of the Act, however, have been met. Since the rollback the parties have met to discuss the implementation of the rollback. The Board is satisfied that they have therefore "met and bargained" within the meaning of section 15(2). Accordingly, in the Board's opinion, the Minister may appoint a conciliation officer under section 15(2) of the Act.

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**0281-77-U Teamsters, Chauffeurs, Warehousemen and Helpers Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Complainant), v. N-J Spivak Limited, (Respondent).**

**Section 79 – Duty to Bargain in Good Faith – Whether in the circumstances employer failure to table monitory position is bargaining in bad faith.**

**BEFORE:** A. L. Haladner, Vice-Chairman, and Board Members F. W. Murray and O. Hodges.

**APPEARANCES:** *I. J. Thomson, Paul Pellettier and E. Winegarden for the complainant; J. McCombe, George Shaw and Jim Spivak for the respondent.*

**DECISION OF THE BOARD;** July 29, 1977

1. This is a complaint under section 79 of the Act wherein the applicant has alleged that the respondent has violated section 14 of the Act.



2. At the conclusion of the complainant's evidence in chief, the Board advised that the evidence before it, even if accepted in its entirety, was insufficient to establish a violation of section 14, and that accordingly, the Board was dismissing the complaint.
3. Mr. E. Winegarden was the sole witness for the complainant. His evidence may be summarized as follows.
4. The applicant was certified as bargaining agent for a unit of employees of the respondent on April 5, 1976. Notice to bargain was sent to the respondent on April 12th by E. Winegarden, the business agent and vice-president of the complainant. On April 19th, George Shaw, the respondent's comptroller, advised that the matter was in the hands of the respondent's solicitors and that the complainant would be advised accordingly in due course.
5. On April 26th, Winegarden made a request on behalf of the complainant for conciliation. This action was taken without any further communication with the respondent.
6. Conciliation was subsequently granted, and a meeting was held with the conciliation officer on June 2, 1976.
7. On June 4th, Shaw sent a letter to Winegarden proposing a series of negotiation meetings to commence June 9, 1976. On June 9, 1976, Shaw sent another letter to Winegarden requesting the complainant's advice as to whether or not it was prepared to commence negotiations. On June 11, Winegarden advised that the complainant was available for negotiations, and further that his schedule had been very busy and that he would be in touch to arrange a meeting date.
8. On July 12, 1976, Winegarden telephoned Shaw, and indicated that the Ready-Mix negotiations for London, Hamilton and Toronto had been completed. Shaw requested a copy of the settlement, and they agreed to meet within a few days. The next day Shaw came to Winegarden's office and picked up a copy of the settlement.
9. On July 19, Winegarden telephoned Shaw again and requested a meeting. At that time, Shaw requested a copy of the Mathews' Read-Mix Agreement which had expired.
10. On July 26, Winegarden delivered a copy of the Mathews' Agreement and made a further request for a meeting. At that time, Shaw indicated he wanted some time to study it, and said he would sit down with Winegarden in a couple of days.
11. On July 27, 1976, Winegarden telephoned Shaw and they agreed to set up a meeting for August 9th.
12. On or about July 28, 1976, Winegarden authorized a strike by the complainant and the setting up of a picket line around the respondent's premises. This action was taken without any further discussions with the respondent. (The strike was a legal strike, the parties having received a No Board Report on July 6, 1976.)
13. Prior to August 9th, Shaw informed Winegarden that there would be no meeting until the picket line was removed. On August 10th, the picket line was removed, and on that

day, Shaw sent a letter to Winegarden asking him to clarify the complainant's position on the proposed collective agreement, and present the respondent with specific demands so that it could consider and evaluate them and thereby commence meaningful negotiations. In that letter, Shaw indicated that the respondent had not yet received a copy of the current Mathews Agreement.

14. On August 12th, the complainant requested the appointment of a mediator.

15. On August 13th, Winegarden sent a letter to Shaw advising that the complainant was agreeable to meet and commence negotiations within five days.

16. On August 18th, Shaw acknowledged receipt of Winegarden's letter of August 13th and notification on August 16th of the complainant's request for the appointment of a mediator. He also indicated that the respondent had met with the mediator, and would await an indication from the mediator as to when the meetings requested by the complainant would be scheduled.

17. On December 31, 1976, following the release of the Board's decision on the respondent's request for reconsideration of the Board's decision of April 5, 1976 (see paragraph 4), Winegarden requested that a second mediation officer be appointed.

18. On January 25, 1977, the parties met in London. At that time, the respondent asked for, and was given, a one week adjournment to study the material which it had received from the complainant only the day before. This material included the new Mathews Agreement, and further specific proposals made on behalf of the employees in the bargaining unit.

19. The parties met again on February 7th at which time the respondent made a complete response to the complainant's proposal on non-monetary items. The parties met for the entire day. However, there remained at the end of the day a large number of outstanding language issues. Apparently the respondent was taking a hard line on language and wanted to resolve that matter first before dealing with money.

20. On February 21st, the parties met again and there was an exchange of positions on non-monetary items. At that meeting, concessions were made by both sides and some issues were resolved. However, it appears that both parties were taking a hard line on the issue of language.

21. On March 16th, the complainant filed a complaint under section 79 of The Labour Relations Act, alleging bad faith bargaining on the part of the respondent.

22. The respondent subsequently agreed to resume negotiations if the complaint was withdrawn. The complaint was withdrawn without prejudice and on April 12th and 13th, the parties resumed negotiations. Substantial progress was made on the 12th. However, negotiations bogged down again on the 13th.

23. On April 20th, the parties met again, and negotiations broke off without any request by either side for further meetings.

24. On May 2nd, the parties met again in the presence of the mediator, also without success. At the May 2nd meeting, the complainant wanted the respondent to put a monetary offer on the table, while the respondent wanted to settle the outstanding language issues first.

25. While the Board is concerned that there is some evidence that the employer has been dragging its feet, we also note a pattern of conduct on the part of the trade union which can hardly be said to have been aimed at creating a better atmosphere for negotiations. The fact is that the parties have met and have bargained, and the evidence indicates that both are taking tough positions.

26. The complainant contended that the respondent, by failing to place a monetary offer on the table at the May 2nd negotiation meeting, had acted in violation of section 14 of the Act. There was no other specific allegation of a failure to bargain in good faith.

27. A refusal by an employer to place a monetary offer on the table until after all language issues have been settled might, under other circumstances, amount to a breach of section 14. However, the Board is of the view that, in the circumstances of this case, it did not.

28. The complaint is dismissed.

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**0081-77-R** Malcolm K. Wilson, (Applicant), v. Teamsters Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Respondent), and N-J Spivak Limited, (Intervener).

**Termination – Comparison of circumstances giving rise to statements in opposition to certification and termination applications – Effect on inferences regarding voluntariness of petitions.**

**BEFORE:** Kevin M. Burkett, Vice-Chairman and Board Members H.J.F. Ade and E. Boyer.

**APPEARANCES:** *Daniel V. McCarthy and M.K. Wilson for the applicant; I.J. Thomson, J. Weingarden and Paul Pellettier for the respondent; J.B. Noonan and George Shaw for the intervener.*

**DECISION OF THE BOARD:** July 15, 1977

1. This is an application filed under section 49 of the Act for a declaration that the trade union no longer represents the employees in the bargaining unit. The parties were agreed that this is a timely application pursuant to section 49 of the Act.

2. In disposing of an application filed under section 49(1) of the Act the Board, pursuant to section 49(3) of the Act, is required to ascertain "the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per



cent of the employees in the bargaining unit have voluntarily signified in writing ... that they no longer wish to be represented by the trade union ... and if not less than 45 per cent have so signified the Board shall by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated."

3. The documentary evidence in support of this application consists of a statement of desire which bears the following heading:

"WE, THE UNDERSIGNED, STATE THAT WE ARE EMPLOYEES OF N.J. SPIVAK LIMITED ENGAGED IN THE READY MIX CONCRETE OPERATION AT AND OUT OF N.J. SPIVAK LIMITED'S PREMISES AT R.R. #1, LONDON, ONTARIO IN THE BARGAINING UNIT FOR WHICH THE TEAMSTERS LOCAL 141 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA WAS CERTIFIED ON OR ABOUT APRIL 5, 1976, AND THAT WE NO LONGER WISH TO BE REPRESENTED BY THE TEAMSTERS LOCAL 141 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND THAT WE HAVE VOLUNTARILY PLACED OUR SIGNATURES TO THIS DOCUMENT."

The statement is signed by ten of the fourteen bargaining unit employees and accordingly the statement, if proven to be a voluntary expression of those who signed it, would cause the Board to order that a representation vote be taken pursuant to section 49(3) of the Act.

4. Mr. Malcolm K. Wilson, a bargaining unit employee of the intervener company, filed the application and personally witnessed the signatures of all the persons who signed the statement of desire. Mr. Wilson gave first hand evidence as to the circumstances surrounding the origination, preparation and circulation of the statement filed in support of the application and in so doing satisfied the evidentiary burden which falls to the applicant. His evidence satisfies the Board that the intervener employer was not involved in the origination, preparation or circulation of the statement.

5. The union argued that the Board must consider this application within the context of the relationship which had existed between the company and the union since the certification of the union on April 5, 1976, and must also consider the role played by Mr. Wilson (the applicant in this matter) in the ongoing relationship. The Board certified the respondent trade union in a decision dated April 5, 1976. The Board dismissed a statement of desire filed in opposition to the application for certification by Mr. Wilson at paragraph 7 of its April 5, 1976 decision. The Board said:

"The Board has reviewed the evidence in this case and must conclude that the petition does not represent a voluntary expression of those who have signed it. In the circumstances of this case an employee might logically have concluded that management supported the circulation of the document and could become aware of the individual's choice. In regard to, *firstly*, the meetings between Mr. Wilson and Mr. Shaw both

before and after the posting of the official notice; *secondly*, the granting of time off work to Mr. Williams and his return to the work location in street clothes, whereupon he circulated the document without apparent interference from the supervisory staff, and *thirdly* the timing of the blackboard notice and the subsequent references by Mr. Wilson in his discussions with the petitioners to the improvements the company would be prepared to consider. None of these factors alone or taken together would support a finding of direct management interference, they would, however, cause an employee to logically suspect that the hand of management was present in the circulation of the statement in opposition to the union. Having regard to the "responsive" nature of the employer/employee relationship the Board must find therefore that in these circumstances the freedom of expression has been effectively thwarted. The Board must conclude that an employee might well have signed the statement out of fear that failure to do so would jeopardize his employment or out of an attempt to ingratiate himself with his employer rather than out of genuine opposition to the trade union."

Subsequent to the certification of the union, Mr. Wilson filed with the Board allegations of intimidation and fraud against the union. The Board in a decision dated December 22, 1976 dismissed the allegations of Mr. Wilson. It is the position of the union in this matter that the prior activities of Mr. Wilson in opposition to the union have so identified him with the management of the company that the statement of desire circulated by him cannot be found to be a voluntary expression of those who signed it.

6. In contrast to a statement filed in opposition to an application for certification a statement of desire filed in support of a termination application under section 49 of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49, a section designed to give vent to employee desires, requires the passage of at least one year from the date of the union's certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 of the Act.

7. In the instant case the Board has before it first hand evidence as to the origination, preparation and circulation of the statement of desire which establishes that the employer was not involved in its formulation or circulation. The Board is not prepared to infer, on the basis of the evidence before it or on the basis of Mr. Wilson's prior opposition to the union, that the statement is other than a voluntary expression of those who signed it. If Mr. Wilson had acted on behalf of management or had acted as the agent of management in preparing and circulating the petition filed in opposition to the certification of the union his conduct at that time may have undermined the statement which is presently before the Board. The Board, however, did not find that Mr. Wilson acted on behalf of the company, but rather the Board found that the employees might reasonably have concluded at that time that the employer supported the petition and would come to know who signed it and who did not. In the face of the uncontradicted evidence before it as to the origination, prep-

aration and circulation of the statement filed in support of this application and having regard to the passage of time and to the purpose of the section, the Board is not prepared to draw a similar inference in this matter. The Board is supported in its determination by a series of recent cases which hold that a section 49 application is not necessarily tainted by prior involvement in a petition in opposition to the certification of the trade union. (See re *Artistic Woodwork Co. Ltd.* case [1973] OLRB Rep. Sept. 691, *DeVilbiss (Canada) Limited* case Board File 1349-76-R, decision dated December 7, 1976 and *J.A.K. Electrical Contractors Limited* case, Board File No. 2025-76-R, decision dated May 18, 1977.

8. The Board is satisfied that not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the respondent union and accordingly the Board directs that a representation vote be conducted among the employees in the bargaining unit. Those eligible to vote are all employees of N-J Spivak Limited engaged in the Ready Mix Concrete operation at and out of N-J Spivak Limited's premises at R.R. #1, London, Ontario save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

9. Voters will be asked whether or not they wish to be represented by the respondent union in their employment relations with N-J Spivak Limited.

10. The matter is referred to the Registrar.

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**1311-76-R Hotel & Restaurant Employees and Bartenders  
International Union Local 412, (Applicant), v. J J's Restaurants  
Limited, carrying on business as Water Tower Inn, (Respondent), v.  
Group of Employees, (Objectors).**

**Certification – Employee – Practice – Effect of late challenge to employee status.**

**BEFORE:** Kevin M. Burkett, Vice-Chairman and Board Members E. Boyer and J.E.C. Robinson, Q.C.

**DECISION OF THE BOARD:** June 10, 1977

1. In a decision dated November 18, 1976 the Board appointed Mr. D.A. McNabb, Labour Relations Officer, to meet with the parties and inquire into the duties and responsibilities of certain disputed classifications and into the accuracy of the schedules of employees.

2. In a decision dated February 28, 1977 the Board recorded the agreement of the applicant to withdraw all of its challenges to the schedules of employees and made certain findings with respect to the disputed classifications.



3. In a decision dated March 24, 1977 the Board acknowledged receipt of a letter from the applicant dated March 9, 1977 and directed that a representation vote be held. The representation vote was held on April 21, 1977. Six persons were challenged by the applicant and their ballots were segregated and sealed. The applicant in a letter dated May 11, 1977 states that in its opinion three of the persons whose ballots have been segregated are employed in a confidential capacity and that one other is employed in a managerial capacity. It is the contention of the applicant that these four persons should not have been allowed to vote and that accordingly their ballots should be destroyed. The applicant argues that the other two persons whose ballots have been segregated are properly employees of the respondent on lay-off and that their ballots should be counted.

4. The names of the three persons allegedly employed in a confidential capacity and the person allegedly employed in a managerial capacity appear on the schedule submitted by the respondent in response to the initial application for certification. The applicant was given every opportunity to challenge these schedules and as noted in paragraph 2 herein it chose not to challenge the employment status of these four persons. The applicant cannot now challenge their status. The Board therefore directs that the ballots of these four persons, namely George Black, Michael H. Chindamo, A. Salatuk and Barbara Meier be counted. If the entitlement of the trade union to certification remains in doubt after these ballots have been counted the Board directs that a Labour Relations Officer be appointed to inquire into the employment status of Pamela Guzzo and Carmela Palmeiro as of the date the vote was directed and as of the date of the taking of the vote.

5. The matter is referred to the Registrar.

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**2023-76-R International Molders & Allied Workers Union, (Applicant), v. EX-CELL-O WILDEX, Canada, Division of Ex-Cell-O Corporation of Canada Limited, (Respondent), v. Group of Employees, (Objectors).**

**Certification – Section 79 – Whether employer misconduct sufficient to justify certification without a vote pursuant to section 7a.**

**BEFORE:** A. L. Haladner, Vice-Chairman, and Board Members F. W. Murray and O. Hodges.

**APPEARANCES:** *Edward C. Witthames, Gordon Plancke and Jeffrey Egner for the applicant; R. A. Werry and L. Daw for the respondent; Marlene Zwaan and Philip J. Malcolm for the objectors.*

**DECISION OF A. L. Haladner, Vice Chairman, Board Member O. Hodges.**

1. The name: “Wil-Dex Unit of Ex-Cell-O Corporation of Canada Limited” appearing in the style of cause of this application as the name of the respondent is amended to read: “Ex-Cell-O Wildex, Canada, Division of Ex-Cell-O Corporation of Canada Limited”.

2. This is an application for certification in which the applicant has requested that it be certified without a vote pursuant to section 7a of The Labour Relations Act.
3. The applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. Having regard to the agreement of the parties, the Board finds that all office, clerical and technical employees of the respondent at Clinton, Ontario save and except manager, persons above the rank of manager, sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. The Board further finds that there were six employees in the bargaining unit at the time the application for certification was made. The applicant's evidence of membership indicates that three of these employees were members of the applicant on March 15, 1977, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of The Labour Relations Act to be the time for the purpose of ascertaining membership under section 7(1) of the Act.
6. A statement of desire in opposition to the application was filed in this case. The only effect that such a statement can have is to cause the Board to exercise its discretion to order a representation vote in a case where outright certification might otherwise be granted pursuant to section 7(3). Because the applicant's initial membership position is below the percentage level required for outright certification under section 7(3) (and because the issuance of a certificate pursuant to section 7a requires a finding that a representation vote would be unlikely to disclose the true wishes of the employees) the statement of desire is of no relevance and has not been inquired into by the Board.
7. The applicant commenced a campaign to organize the employees of the respondent in late February of 1977. On Monday, March 7, the applicant filed two separate applications for certification: the first, in respect of the employees in the plant; and the second, in respect of the employees in the office. We are concerned here with the second application.
8. On the same Monday, March 7, the employees in both the plant and the office were required to attend a meeting in the respondent's cafeteria. At that meeting, a letter purportedly written by the general manager of the respondent was read to the employees by Pat Newington, the respondent's manufacturing manager. This letter was not produced at the hearing. However, the uncontradicted evidence of the witnesses who testified for the applicant was that the letter, as read, outlined the disadvantages of having a union, and as well, contained statements to the effect that certain employment privileges might be withdrawn if the union got in.
9. Following the recitation of the general manager's letter, the employees in attendance at the meeting were told by Newington that if any of them wanted to talk about it or had any second thoughts, they were to feel free to come in and see him in his office.
10. Shortly after the meeting in the cafeteria, the employees in the office were approached at their desks by the office manager, Larry Daw, who inquired as to whether they had been in contact with the union and had signed cards. One of those employees, Joy

Cleave, gave evidence, which was neither challenged on cross-examination nor contradicted by the evidence of the respondent, that she was called into Mr. Daw's office the next day, Tuesday, March 8, and again asked whether she had signed a card. Her evidence was that she originally denied having signed a card, but finally admitted to this after Daw stated he knew she was lying but would give her a second chance.

11. A non-bargaining unit employee, J. Carter, was also called into Daw's office on Tuesday, March 8, and subjected to the same form of intimidation.

12. The interrogation of persons by management regarding their union membership appears to have been confined to the office. While there was evidence at the hearing that some of the employees in the plant had been approached by management after the March 7 meeting and asked questions of a general nature regarding the union, there was no evidence that any of these employees had been questioned about their personal affiliation or in any other way interrogated.

13. The applicant contends that the respondent's interference in its organizing campaign was such that a representation vote would not show the true wishes of the employees. It has asked that the Board certify it, without a vote, pursuant to section 7a of The Labour Relations Act.

14. Certification without a vote under section 7a was designed as both a deterrent to illegal employer interference in union organizational campaigns, and as a device to provide a meaningful and effective remedy in those cases where the employer's interference operated to destroy the free selection process guaranteed by section 3 of the Act. Prior to the 1975 amendments to the Act, a union seeking to have section 7(4), the predecessor to section 7a, invoked was required to have filed membership evidence on behalf of at least fifty per cent of the employees in the bargaining unit. In recognition of the fact that employer interference often occurs early in an applicant's organizing campaign, and before a majority has been obtained, the fifty per cent membership requirement was removed by the 1975 amendments.

15. Section 7a provides as follows:

"Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit."

16. As the Board pointed out in *Winson Construction Limited*, [1976] OLRB Rep. Nov. 714, the effect of applying section 7a is to take an application out of the normal certification process. Ordinarily, a union, in order to obtain automatic or outright certification under The Labour Relations Act, must exhibit unqualified support from at least fifty-five per cent of the employees in the appropriate bargaining unit. The fifty-five per cent requirement



reflects the belief that there must be some margin for error; and that, therefore, something more than a simple majority is necessary to ensure that the bargaining agent has a true mandate. Where, as here, an applicant union does not obtain the membership percentage required to qualify for outright certification, but enjoys the support of at least forty-five per cent of the bargaining unit employees, the Board will normally order a representation vote. In order to be certified after a vote, an applicant must obtain at least fifty per cent of the votes cast.

17. Section 7a allows the Board to certify a trade union as bargaining agent without the membership percentage usually required for outright certification. It is not surprising, then, that the Legislature has placed a number of legal restrictions on its use. As the wording of the section makes clear, it is not enough that the employer has engaged in conduct prohibited by The Labour Relations Act. This conduct must have resulted in a situation where the true wishes of the employees are not likely to be ascertained from the results of a representation vote. As well, the trade union must, in the opinion of the Board, have membership support adequate for the purposes of collective bargaining in the unit found appropriate by the Board.

18. The logic of these requirements is clear enough. The premise of the Act's certification procedures is that collective bargaining is to be afforded only when it is the choice of the majority. Accordingly, the grant of automatic certification to a trade union, in the absence of "documented" evidence of majority support, should only be permitted where the true wishes of the employees are not likely to be ascertained through the normal procedures and where the union has sufficient support among the employees in the unit to bargain collectively with the employer.

19. The Board has indicated, quite clearly, that certification without a vote under section 7a is not an automatic response to every unfair labour practice which occurs in the pre-certification period, and that an applicant must establish substantial employer interference in the certification process to secure a determination that "the true wishes of the employees are not likely to be ascertained". (See, for example, *Robin Hood Multifoods Limited*, [1976] OLRB Rep. May 250.) In this regard, a distinction has been drawn between the criteria used to determine whether a statement of desire (or petition) in opposition to an application for certification reflects the true wishes of the employees who signed it and the criteria used to determine whether the true wishes of the employees are not likely to be ascertained from the results of a representation vote, which is conducted under the supervision of the Board, and by secret ballot. As the Board stated in *Smith Beverages Limited* [1975] OLRB Rep. Dec. 956, if an employee logically suspects that his employer will become aware of his signing or his refusal to sign a petition, this can effectively thwart his free expression as represented by his signature. For this reason, very little in the way of employer interference, in the surrounding circumstances, need be shown for the Board to conclude that a petition does not represent a true change of mind by the employees who signed it such that it should cause the Board to exercise its discretion to order a vote. The situation is quite different on a representation vote, however, where the employees can usually rest assured that their choice will not be revealed to their employer; and therefore, the Board requires evidence of intimidation or coercion such that the secrecy of the ballot cannot be relied upon to ensure a free expression of employee views.

20. In *Winson* (supra), the Board offered this example of the kind of intimidatory or coercive activity on the part of an employer which would, by its very nature, be likely to conceal the true wishes of an employee on a secret ballot:

“No general rules can be set down as to what circumstances might justify a conclusion that employee desires are not likely to be ascertained in a representation vote. Rather, each case must be decided on its own particular facts. In some instances the actions of an employer may be such that a determination that a vote would not be reflective of employee desires may be very easily arrived at. For example, a warning to employees that the certification of a trade union would result in lay-offs and shorter working hours would, lacking any other considerations, tend to have such an intimidating effect that employees might reasonably be expected to refrain from voting for the union no matter what their true feelings about being represented by it ... In such a situation to vote in favour of being represented by the trade union might well appear to employees to be tantamount to voting themselves either out of a job or, at best, a drop in pay.”

21. Turning now to the situation at hand, before the Board can exercise its discretion under section 7a and certify the applicant without a representation vote, there are three conditions which must be met. First, the respondent must have contravened the Act. Second, this contravention must have resulted in a situation where the true wishes of the employees are not likely to be ascertained. Third, the applicant must have membership support adequate for the purposes of collective bargaining in the bargaining unit found appropriate by the Board.

22. There can be no doubt that the first condition to the exercise by the Board of its discretion under section 7a – a contravention of the Act by the employer – has been satisfied. When management holds a meeting of employees in the midst of a union organizing campaign, in circumstances amounting to a “captive audience”, at which it suggests, by way of a letter purportedly written by the non-attending general manager, that certain employment privileges might be withdrawn in the event the union is successful; and then invites employees having “second thoughts” to meet privately with it; and then interrogates persons individually, in the confines of its office, as to their membership in the union, it can hardly be contended that the employer has not contravened the Act. Indeed, counsel appeared to have conceded as much, for he made no argument on this issue.

23. The conduct of the respondent in this case constitutes substantial interference with the right of the applicant to organize employees for purposes of collective bargaining and with the right of employees to select or reject a trade union as bargaining agent. As such, it amounts to a clear violation of section 56 of The Labour Relations Act which prohibits, among other things, employer interference with the selection of a trade union. The respondent’s conduct also amounts, in our view, to a violation of section 58(c) and section 61 of the Act, both of which prohibit the intentional use of intimidation or coercion by an employer to compel an employee to refrain from becoming or to cease to be a member of a trade union.



24. The answer to the question of whether the respondent's conduct in contravention of The Labour Relations Act has made the ascertainment of the true wishes of the employees unlikely is perhaps less obvious. The Board has come to the conclusion, however, that this second condition to the exercise of our discretion under section 7a has been more than amply satisfied.

25. The kind of illegal interference engaged in by the employer in this case is the very kind of interference which is inherently likely to influence an employee's ability to vote in accordance with his own free wishes. Although the employer here has not, in contrast to the employer in the hypothetical situation described by the Board in *Winson*, threatened its employees with lay-offs or shorter working hours, when the actions of this employer are viewed in their entirety, there can be little doubt that they contained, and were intended to contain, an implicit threat to the employees' job security. It is equally clear, moreover, that the employer's actions in contravention of the Act have caused employees to believe that by supporting or continuing to support the union, they could be placing their jobs in jeopardy. How else is one to explain Cleave's initial denial of her union membership and her subsequent admission after being told by her manager that she would be given a "second chance".

26. The Board has also been cognizant of the fact that we are dealing here with a small unit of employees who are likely to be particularly vulnerable to employer pressure. In this regard, it bears repeating that the most blatant instance of employer coercion and intimidation – namely the interrogation of persons as to their union membership – seems to have been restricted to the office.

27. Another feature of this case which has led the Board to conclude that a representation vote would be unlikely to disclose the true wishes of the employees relates also to the size of the bargaining unit. As stated earlier, the secrecy of the ballot can, in the majority of cases, be counted on to safeguard the right of the bargaining unit employees to vote in accordance with their own free wishes. In a unit the size of this one, however, the employees may well have cause to fear that a vote in favour of the union would be subject to identification by their employer. This is particularly true where, as here, the employer has already displayed an apparent knowledge of which employees have signed cards. It must always be remembered that while the ballots in a representation vote are secret, the results of the vote are not.

28. To sum up our conclusion of this question of the likelihood of ascertaining the true wishes of the employees on a representation vote, the Board has determined that the nature and extent of the respondent's interference in the applicant's organizing campaign was such, especially in view of the size of the bargaining unit, that a representation vote would be unlikely to disclose the true wishes of the employees who voted.

29. The final condition which must exist before the Board may certify a trade union without a vote under section 7a is that the union have membership support adequate for the purposes of collective bargaining. In this case, the applicant had, as of the date of its application for certification, the documented support of at least half the employees in the bargaining unit found by the Board to be appropriate for collective bargaining. This is obviously "support adequate for the purposes of collective bargaining", and we so find.



30. The Board considers this an appropriate case to exercise its discretion and grant the applicant's request for certification pursuant to section 7a of the Act.

31. A certificate will issue to the applicant.

#### **DECISION OF BOARD MEMBER F. W. MURRAY:**

1. While I agree with the majority in paragraph 23 wherein it found that the respondent had violated sections 56, 58(c) and 61 of the Act, I am not persuaded that the violations were of such a nature and extent as to result in a situation where the true wishes of the employees are not likely to be ascertained.

2. Accordingly, I would have directed a representation vote.

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**0369-77-R** Niagara Peninsula Beverage & Hotel Employees Union, (Applicant), v. **Local 199 U.A.W. Building Corporation**, (Respondent), v. Local 756 of the Hotel and Restaurant Employees and Bartenders International Union, (Intervener).

**Trade Union Status – Whether trade union has complied with requirements concerning membership, constitution, and election of officers.**

**BEFORE:** Pamela C. Picher, Vice-Chairman, and Board Members O. Hodges and F. W. Murray.

**APPEARANCES:** *J. McNamee and W. McTaggart appearing for the applicant; Douglas J. Wray, A. J. Sandy Potter, Jacques Hebert and Frank Cotese appearing for the intervener; no one appearing for the respondent.*

**DECISION OF THE BOARD:** July 28, 1977

1. No statement of objections and desire to make representations has been filed with the Board within the time fixed under subsection 2 of section 45 of the Board's Rules of Procedure following the taking of the pre-hearing representation vote pursuant to the Board's direction of June 10, 1977.

2. The purpose of the hearing in this matter was to allow the applicant to prove that it is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act* which reads as follows:

“(n) ‘trade union’ means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national or international trade union and a certified council of trade unions.”

3. Mr. Richard McTaggart, the president of the applicant, gave evidence to seek to prove its status as a trade union. He testified that on May 29, 1977 he called a meeting of employees of the respondent. Six out of seven employees notified attended the meeting. No non-employees or members of management were in attendance.

4. The employees present at the meeting designated Mr. McTaggart to act as Chairman of the meeting. They then each filled out applications to join the union, paid a \$1.00 initiation fee and were given receipts for that payment.

5. The constitution and by-laws which had been drawn up on May 25, 1977 were read over, discussed, amended and passed by a majority vote. Article II of the constitution indicates that purpose of the organization includes the regulation of labour relations.

6. The election of officers then took place and Mr. McTaggart was elected president. Persons were also elected to fill the office of vice-president, recording secretary and financial secretary.

7. After the election a motion was made for the parties to meet every second Sunday. The evidence indicates that meetings have taken place since May 29th.

8. Minutes were kept of the meeting of May 29th but were not put into evidence.

There is basic agreement on the facts. Counsel for the intervener submits, however, that the applicant is not a trade union within the meaning of section 1(1)(n) of the Act because the employees became members prior to the adoption of a constitution and were not reaffirmed as members afterwards. Counsel argues that, therefore, what the employees joined was something other than a trade union. Counsel further submits that there is no evidence that the members were admitted in accordance with the constitutional requirements.

10. The following steps should be taken by an organization wishing to establish its status as a trade union within the meaning of the Act.

- (1) A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings;
- (2) the constitution should be placed before a meeting of employees for approval;
- (3) the employees attending such meeting should be admitted to membership;
- (4) the constitution should be adopted or ratified by the vote of said members;
- (5) officers should be elected pursuant to the constitution.

11. In this case the employees who became members prior to the adoption of the constitution and were not formally confirmed as members after the adoption of the constitu-

tion. The question arises therefore as to whether the constitution was ever ratified by "members" and whether the persons who signed membership cards actually became members of a union rather than some other type of organization.

12. In the *Hotel Dieu Hospital*, [1969] OLRB Rep. June 367 the Board ruled that failure by the employees to adopt the constitution after having become members was not a defect where admission to membership and the adoption of the constitution occurred at the same meeting. At pp. 367-368 the Board made the following statement:

Immediately following the adoption of the constitution, all thirty employees were enrolled as members of the applicant. The minutes, however, do not disclose that the members subsequently ratified or confirmed the constitution after becoming members of the applicant. We are of opinion that where a constitution is adopted at a meeting and the persons who adopted the constitution became members of the organization at the same meeting at which the constitution is adopted, the Board would be taking a very technical position if it distinguished in point of time between the signing of members and the adoption of the constitution. If the signing of members and the adoption of the constitution take place at the same meeting they should be deemed to have taken place simultaneously. It therefore is of little consequence whether the persons in attendance at the meeting were enrolled as members prior to the adoption of the constitution or whether the constitution is adopted prior to the enrollment of the members so long as these events take place at the same meeting. If everything is done at the one meeting no subsequent confirmation or ratification is necessary. However, this situation is to be distinguished from the situation where persons become members in a named organization and some days or weeks elapsed before the organization comes into existence by the adoption of the constitution. In such instance at the time the membership was signed there was no organization to join. Similarly, if a constitution is adopted at a meeting and some days or weeks elapse before anyone becomes a member of the constituted organization, subsequent ratification by the membership would be required.

However, where, as in this case, the organization is constituted and members are enrolled at the same meeting, no subsequent ratification or confirmation of the constitution of the organization is required and there can be no question as to the validity of the membership evidence.

13. In *Proctor-Lewyt Division of S.C.M. (Canada) Limited*, [1969] OLRB Rep. Sept. 760 the Board, in a similar vein stated at pp. 761-762 that,

If the respondent's employees at the July 23rd meeting had become members of the applicant at that meeting and if the persons elected to hold office in the applicant had been among those enrolled as members, the Board would have treated the signing of members, the adoption of the constitution and the election of officers as having taken place simultaneously.



14. More recently the Board in *Charterway Transportation Limited*, (File No. 0319-77-R, dated June 24, 1977), affirmed the same principle, that is, that the strict adherence to the technically proper sequence of the acts is not mandatory when all the steps are carried out in a single meeting.

15. The Board has found that in some circumstances applications for membership and the payment of \$1.00 occurring prior to the adoption of the constitution have not sufficiently complied with the required procedures. These cases are distinguishable from the case at hand, however, because in those circumstances the formation of the trade union has occurred over a more extended period of time. (See for example *M. Loeb Limited*, [1962] OLRB Rep. May 62, and *Whitney's White Rose*, [1967] OLRB Rep. April 52).

16. In this case the application for membership, the payment of the initiation fee, the adoption of the constitution and the election of officers all took place at the same meeting. These events may be seen as all being a part of the same occurrence. There is no question that each act was intended to be related to each other act and that all acts were designed to make the applicant a trade union.

17. On the basis of all the evidence and having regard to the membership requirements in the constitution the Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

18. Having regard to the agreement of the parties, the Board further finds that all full and part-time employees employed by the Company in the categories bartender, waiter, bar boy improviser and janitor, constitute a unit of employees of the respondent appropriate for collective bargaining.

19. The Registrar is directed to cause all the ballots cast in the pre-hearing representation vote herein to be counted.









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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1977

### BARGAINING AGENTS CERTIFIED DURING JUNE

#### No Vote Conducted

**3055-72-R:** Electrical Division of the Construction Association of Thunder Bay (Applicant) v. Local Union No. 339, International Brotherhood of Electrical Workers (Respondent) v. Electrical Power Systems Construction Association (Intervener).

Unit: "all employers of electricians and electricians' apprentices on whose behalf the respondent is entitled to bargain in the District of Kenora including the Patricia Portion of the District of Kenora being west of the 87° meridian the District of Rainy River and the District of Thunder Bay, and in the industrial, commercial and institutional sector of the residential sector of the construction industry." (17 employers in the unit).

**0596-75-R:** The Sudbury Electrical Contractors Association (Applicant) v. Local Union 1687 of the International Brotherhood of Electrical Workers (Respondent) v. Electrical Division of the Construction Association of Thunder Bay (Intervener).

Unit: "all employers of journeymen electricians and electricians' apprentices for whom the respondent has bargaining rights in the districts of Sudbury, Algoma, Manitoulin, Nipissing, Timiskaming, Cochrane, Parry Sound (except townships of Humphrey, Conger, Christy, Foley, Cowper, McKellar, McDougall and Hagerman) and Patricia Portion of Kenora being east of the 87° meridian in the industrial, commercial and institutional sector and in the residential sector of the construction industry." (38 employees in the unit).

**0448-76-R:** Christian Labour Association of Canada (Applicant) v. Graceview Enterprises Inc. (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

**0842-76-R:** Canadian Union of Bank Employees (Applicant) v. Canada Trustco Mortgage Company (Respondent).

Unit: "all employees of the respondent at its branch in Simcoe, save and except the accountant, assistant manager, persons above the rank of accountant and assistant manager, persons employed in the real estate offices, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (10 employees in the unit).

**1500-76-R:** Amalgamated Clothing and Textile Workers Union Toronto Joint Board (Applicant) v. Dylex Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in its Central Distribution and Warehousing Division in Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foremen and fore-

lady, group supervisor, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week.” (215 employees in the unit).

**2022-76-R:** International Molders & Allied Workers Union (Applicant) v. Ex-Cell-O Wildex, Canada, Division of Ex-Cell-O Corporation of Canada Limited (Respondent) v. Employees (Objectors).

Unit: “all employees of the respondent at Clinton, Ontario, save and except supervisor, persons above the rank of supervisor, and offices, clerical, sales and technical employees.” (27 employees in the unit). (*Having regard to the agreement of the parties*).

**2023-76-R:** International Molders & Allied Workers Union (Applicant) v. Ex-Cell-O Wildex, Canada, Division of Ex-Cell-O Corporation of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all office, clerical and technical employees of the respondent at Clinton, Ontario save and except manager, persons above the rank of manager, sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

**2027-76-R** Carpenters’ District Council of Toronto and Vicinity, Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Emery Contracting Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

**2047-76-R** International Union of Operating Engineers, Local 793 (Applicant) v. Clow Darling Plumbing & Heating Co. Limited (Respondent) v. United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 628 (Intervener #1) v. The Mechanical Contractors Association of Thunder Bay (Intervener #2).

Unit: “all full-time employees of Clow Darling Plumbing & Heating Co. Limited in the District of Thunder Bay engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman and persons covered by subsisting collective agreements.” (2 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision [1977] OLRB Rep. June*).

**2110-76-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. A. C. Khan Janitorial Services Ltd., Gaza Investments Limited, Del Realty Incorporated, Deltan Realty Limited (Respondents) v. Group of Employees (Objectors).

Unit: “all employees of A. C. Khan Janitorial Services Ltd. engaged in cleaning and maintenance at 1440 and 1442 Lawrence Avenue West, Toronto known as Lawrence Terrace, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff, and persons regularly employed for not more than 24 hours per week.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

**2157-76-R:** The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ball Brothers Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka in the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**2158-76-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Frid Construction Company, Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**0001-77-R:** Ontario Public Service Employees Union (Applicant) v. Ongwanada Hospital – L. S. Penrose Centre (Respondent) v. Canadian Union of Public Employees (Intervener).

Unit: "all employees of the Ongwanada Hospital, Penrose Division at Kingston, save and except the Administrator, Personnel Director, Chief Residential Counsellor and persons above the rank of Chief Residential Counsellor." (126 employees in the unit).

**0030-77-R:** Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Association (Applicant) v. VS Services Ltd. (Respondent) v. Employees (Objectors).

Unit: "all employees of the respondent at the African Lion Safari in Rockton, Ontario, save and except supervisors, managers, office personnel and students employed during the school vacation period." (2 employees in the unit).

**0071-77-R:** International Molders & Allied Workers Union (Applicant) v. Ex-Cell-O London, Canada, A Division of Ex-Cell-O Corporation of Canada Limited (Respondent).

Unit: "all office and clerical employees of the respondent at London, Ontario save and except supervisors, persons above the rank of supervisor, purchasing agents, outside salesmen, methods and standards analysts, professional engineers, secretary to the General Manager, secretary to the Division Managers or the five officers of the respondent, cost analysts, personnel employees, persons employed for not more than 24 hours per week, students employed during the school vacation period, persons in the drafting and engineering department covered by a subsisting collective agreement between the respondent and the International Molders and Allied Workers Union Local 31 and persons covered by a subsisting collective agreement between the respondent and the International Molders and Allied Workers Local 49." (27 employees in the unit). (*Having regard to the agreement of the parties*).

**0120-77-R:** United Steelworkers of America (Applicant) v. W. H. Olsen Manufacturing Company Limited (Respondent).

Unit: "all office, clerical and technical employees of the respondent at Tilbury, save and except supervisors and persons above the rank of supervisor, cost accountant, and secretary to the Executive Vice President." (12 employees in the unit). (*All parties to this matter have agreed*).

**0166-77-R:** Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. 279240 Ontario Limited O/A County Electric (Respondent).



Unit: "all electricians, electricians' apprentices and construction labourers in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**0181-77-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Hillwood Homes (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

**0210-77-R:** Service Employees Union, Local 204 (Applicant) v. Barnesdale Residence, St. Catharines Assn. for the Mentally Retarded (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its Barnesdale Residence in St. Catharines, Ontario, save and except professional medical staff, office staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (28 employees in the unit). (*Having regard to the agreement of the parties*).

**0233-77-R:** Ontario Nurses' Association (Applicant) v. The Corporation of the County of Lambton (Twilight Haven Home for the Aged and North Lambton Rest Home) (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the Corporation of the County of Lambton (Twilight Haven Home for the Aged, Petrolia, and North Lambton Rest Home, Forest) save and except Director of Nursing." (24 employees in the unit).

**0234-77-R:** Ontario Nurses' Association (Applicant) v. Rockcliffe Nursing Home Ltd. (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity at Rockcliffe Nursing Home in Scarborough, Ontario, save and except the Assistant Director of Nursing and those above the Assistant Director of Nursing and nurses regularly employed for not more than twenty-four hours per week." (7 employees in the unit).

Unit #2: "all registered and graduate nurses employed in a nursing capacity at Rockcliffe Nursing Home in Scarborough who are regularly employed for not more than 24 hours per week, save and except the Assistant Director of Nursing and those above the Assistant Director of Nursing." (4 employees in the unit).

**0274-77-R:** Bakery & Confectionary Workers' International Union of America, Local 264 (Applicant) v. Candia Impex Incorporated (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at Ajax, Ontario, save and except supervisors, foremen and foreladies, persons above the rank of supervisor, foreman or forelady, driver-salesmen, office staff, sales clerks and persons regularly employed for not more than 24 hours per week." (10 employees in the unit). (*Having regard to the agreement of the parties*).

**0283-77-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Windsor Tube and Metal Inc. (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (12 employees in the unit). (*Having regard to the agreement of the parties*).

**0287-77-R:** International Association of Bridge, Structural & Ornamental Iron Workers – Local Union No. 700 (Applicant) v. Foster Wheeler Limited (Respondent) v. Laborers' International Union of North America (Intervener #1) v. Labourers' International Union of North America, Local Union 1089 (Intervener #2).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the County of Lambton, save and except nonworking foremen and persons above the rank of non-working foreman." (19 employees in the unit).

**0299-77-R:** Sheet Metal Workers' International Association Local Union 285 (Applicant) v. McKay Heating Co. (Respondent).

Unit: "all journeymen sheet metal workers and registered apprentice sheet metal workers in the employ of the respondent working in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen, persons above the rank of non-working foreman, office staff, sales staff and gas fitters." (10 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision [1977] OLRB Rep. June*).

**0320-77-R:** International Brotherhood of Electrical Workers Local Union 105 (Applicant) v. Trident Holdings Ltd., carrying on business as Trident Electric (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

**0329-77-R:** The Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 124, Ottawa – Hull (Applicant) v. J. Corda Const. Ltd. (Respondent).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**0330-77-R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Nel-Gor Castle Nursing Home (Respondent).

Unit: "all employees of the respondent in London who are regularly employed for not more than twenty-four hours per week and students who are employed in the school vacation period, save and except supervisor, persons above the rank of supervisor, office staff and registered nurses employed in a registered nursing capacity." (7 employees in the unit). (*Having regard to the agreement of the parties*).

**0331-77-R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Nel-Gor Castle Nursing Home (Respondent).

Unit: "all employees of the respondent in London, save and except supervisors, persons above the rank of supervisor, office staff, registered nurses employed in a registered nursing capacity, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (22 employees in the unit). (*Having regard to the agreement of the parties*).

**0332-77-R:** Ontario Nurses' Association (Applicant) v. Chelsey Park Nursing Home Ltd (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity at Chelsey Park Nursing Home Ltd. in Mississauga, save and except the assistant director of nursing and persons above the rank of assistant director of nursing." (16 employees in the unit). (*Having regard to the agreement of the parties* ).

**0333-77-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Gifford Transfer Limited (Respondent).

Unit: "all employees of the respondent at Sudbury, save and except manager and persons above the rank of manager." (15 employees in the unit). (*Having regard to the agreement of the parties*).

**0334-77-R:** Service Employees Union, Local 210 affiliated with Service Employees International Union AFL-CIO-CLC (Applicant) v. Peter Nursing Home Limited (Respondent) v. Employees (Objectors).

Unit: "all employees of the respondent located at Tilbury, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (32 employees in the unit). (*Having regard to the agreement of the parties*).

**0338-77-R:** Service Employees Union, Local 478, Affiliated with Service Employees International Union, A.F. of L., C.I.O., C.L.C. (Applicant) v. Canada Catering Co. Limited (Respondent).

Unit: "all employees of the respondent at Moose Factory, Ontario, save and except unit managers and those above the rank of unit manager, office staff and persons regularly employed for not more than 24 hours per week." (53 employees in the unit). (*Having regard to the agreement of the parties*).

**0339-77-R:** United Garment Workers of America (Applicant) v. Abbey Crest Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foreman and foreladies, persons above the rank of foreman and forelady, office and sales staff." (32 employees in the unit). (*Having regard to the agreement of the parties*). **0344-77-R:** Union of Canadian Retail Employees (Applicant) v. Rose and Laflamme Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except assistant foreman, those above the rank of assistant foreman, office and sales staff and students employed during the school vacation period." (11 employees in the unit). (*Having regard to the agreement of the parties*).

**0346-77-R:** Christian Trade Unions of Canada (Local 6) (Applicant) v. De Groot's Plumbing and Heating Limited (Respondent).

Unit: "all plumbers, plumbers' apprentices, electricians, electricians' apprentices and construction labourers in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town



of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman.” (10 employees in the unit). (*Having regard to the foregoing*).

**0350-77-R:** The Canadian Union of Public Employees (Applicant) v. Medi Park Lodges Inc. carrying on business as Groves Park Lodge (Respondent) v. Group of Employees (Objectors).

Unit #1: “all employees of the respondent at its Nursing Home at Groves Park Lodge, Raglan Street, Renfrew, Ontario, save and except professional and medical staff, registered and graduate nurses, undergraduate nurses, Supervisors, persons above the rank of Supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (20 employees in the unit). (*Certified*).

Unit #2: “all employees of the respondent at its Nursing Home at Groves Park Lodge, Raglan Street, Renfrew, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional and medical staff, registered and graduate nurses, undergraduate nurses, Supervisors, persons above the rank of Supervisor and office staff.” (5 employees in the unit).

**0358-77-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Finlock Beverages Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at Peterborough, Ontario save and except foremen, supervisors, persons above the rank of foreman or supervisor, office staff, persons employed for not more than twenty-four hours per week and students employed during the school vacation period.” (19 employees in the unit). (*Having regard to the agreement of the parties*).

**0362-77-R:** Christian Labour Association of Canada (Applicant) v. Maple Engineering & Construction Company Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Having regard to the foregoing*).

**0372-77-R:** Wood, Wire and Metal Lathers International Union Local 562 (Applicant) v. Asteroid Investments Ltd. (Respondent).

Unit: “all lathers and lathers’ apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (20 employees in the unit). (*clarity note* – see Report of full decision [1977] OLRB Rep. June).

**0386-77-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Ontario Paving, Div. of Giuseppe Alfano & Sons Ltd. (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Niagara and the County of Haldimand engaged in the operation of cranes, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in the unit).

**0388-77-R:** Labourers International Union of North America, Local 607 (Applicant) v. Thunderbrick Limited (Respondent).

Unit: "all employees of the respondent engaged in the manufacture of brick at its plant on Rosslyn Road, in the Township of Paipoonge, in the District of Thunder Bay, save and except foremen, and those above the rank of foremen, office and sales staff." (25 employees in the unit).

**0392-77-R:** Local Union 636 International Brotherhood of Electrical Workers AFL CIO CLC (Applicant) v. Bolton Hydro Electric Commission (Respondent).

Unit: "all employees of the Bolton Hydro Electric Commission in the Town of Caledon Ontario, save and except the Manager and the office staff." (3 employees in the unit).

**0398-77-R:** Lumber & Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Abitibi Paper Company Ltd. (Respondent).

Unit: "all employees of the respondent at its sawmill, planing mill and yard at White River, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (41 employees in the unit). (*Having regard to the agreement of the parties*).

**0401-77-R:** Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Canada Building Materials Company (Respondent).

Unit: "all employees of the respondent at Thorold, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (4 employees in the unit).

**0404-77-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Coventry Group (Respondent).

Unit: "all construction labourers in the employ of the respondent on residential construction in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

**0405-77-R:** Upholsterers International Union of North America A/F/L/ C/I/O/ (Applicant) v. Sklar Furniture Limited (Chair Division) (Respondent).

Unit: "all employees of the respondent at 201 Garyray Drive, Toronto, Ontario, M9L 1P2, save and except foremen, persons above the rank of foreman, office and sales staff." (191 employees in the unit). (*Having regard to the agreement of the parties*).

**0408-77-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Architectural Woodwork Company (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**0416-77-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ontario Formwork (Central) Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

**0420-77-R:** Sheet Metal Workers' International Association (Applicant) v. Modular Architectural Components Limited (Respondent).

Unit: "all students employed during the school vacation period by the Respondent at Cobourg, Ontario." (4 employees in the unit). (*Having regard to the agreement of the parties*).

**0435-77-R:** Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Gillies-Guy Division of CFMG Inc. (Respondent).

Unit: "all employees of the respondent at Hamilton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, independent contractors and employees covered by an existing collective agreement with Local 879." (12 employees in the unit). (*Having regard to the agreement of the parties*).

**0443-77-R:** Christian Labour Association of Canada (Applicant) v. Saccucci Forming Company Ltd. (Respondent).

Unit: "all carpenters, carpenters' apprentices, cement masons and cement masons' apprentices in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to the foregoing*).

**0471-77-R:** Labourers' International Union of North America, Local 1081 (Applicant) v. Capital Paving Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Counties of Brant and Norfolk, save and except non-working foremen and persons above the rank of non-working foreman." (18 employees in the unit).

## Applications Certified Subsequent to Pre-Hearing Vote

**2058-76-R:** International Brotherhood of Painters and Allied Trades, Union Local 1891 (Applicant) v. Cem-Ael Spray Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association Local 48 (Intervener).

Unit: "all employees of the respondent in the Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering and in the County of Ontario, engaged in all sprayed or towelled cementitious, fibre, urethane, cellulose materials for the purpose of fire-proofing, acoustical, insulation and related work, save and except job foremen and persons above the rank of job foreman." (7 employees in the unit).



Number of names of persons on revised voters' list		7
Number of persons who cast ballots		5
Number of ballots marked in favour of applicant	3	
Number of ballots marked in favour of intervener	2	

**2106-76-R:** Canadian Chemical Workers' Union (Applicant) v. Hartz Mountain Pet Supplies Limited (Respondent) v. International Chemical Workers Union, Local 618 (Intervener).

Unit: "all employees of Hartz Mountain Pet Supplies Limited in St. Thomas, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (125 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		125
Number of persons who cast ballots		104
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	85	
Number of ballots marked in favour of intervener	18	

**0100-77-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Canada Bread Division of Corporate Foods Limited (Bartley Drive Plant) (Respondent) v. The Retail, Wholesale, Bakery and Confectionery Workers' Union, Local 461 of the Retail, Wholesale and Department Store Union, AFL-CIO-CLC (Intervener).

Unit: "all regular employees at 196 Bartley Drive Branch, Toronto, save and except driver salesmen, garage employees, office staff, foremen and foreladies, persons above the rank of foreman or forelady, and persons regularly employed for not more than twenty-four (24) hours per week." (185 employees in the unit).

Number of names of persons on revised voters' list		161
Number of persons who cast ballots		147
Number of ballots marked in favour of applicant	101	
Number of ballots marked in favour of intervener	46	

**0129-77-R:** Canadian Chemical Workers Union (Applicant) v. Genstar Chemical Limited (Respondent) v. International Chemical Workers Union, Local 721 (Intervener).

Unit: "all employees of the respondent at its manufacturing plant at Maitland, Ontario, save and except foremen, persons above the rank of foreman, office staff, security guards and employees engaged in temporary construction." (207 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		209
Number of persons who cast ballots		144
Number of ballots marked in favour of applicant	120	
Number of ballots marked in favour of intervener	24	

**0197-77-R:** Canadian Union of Public Employees (Applicant) v. Metropolitan Separate School Board (Respondent).

Unit: "all office, clerical and technical employees of the respondent, Metropolitan Separate School Board in Metropolitan Toronto, Ontario, regularly employed for not more than twenty-four (24) hours per week." (57 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		56
Number of persons who cast ballots	53	
Number of ballots marked in favour of applicant	40	
Number of ballots marked against applicant	13	

**0231-77-R:** United Cement Lime & Gypsum Workers International Union (Applicant) v. Misener Beverages Ltd. (Respondent).

Unit: "all employees of the respondent at its plant at Belleville, Ontario, save and except office and sales staff, foreman and persons above the rank of foreman, employees employed for less than twenty-four (24) hours per week and students employed during the school vacation period." (37 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		34
Number of persons who cast ballots	32	
Number of ballots marked in favour of applicant	17	
Number of ballots marked against applicant	15	

**0253-77-R:** Canadian Paperworkers Union (Applicant) v. Domtar Packaging Limited Corrugated Containers Division (Respondent) v. International Chemical Workers Union and its Local 595 (Intervener).

Unit: "all employees of the Company in its Etobicoke Plant situated at 450 Evans Avenue, Toronto 14, save and except foremen and above, plant security guards, office staff, sales trainees, stationary engineers, engineering trainees, plant clerical staff, time study and methods personnel, and employees engaged in a confidential capacity to labour relations." (263 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		259
Number of persons who cast ballots	223	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	210	
Number of ballots marked in favour of intervener	12	

**0264-77-R:** Service Employees International Union, Local 204 (Applicant) v. South Waterloo Memorial Hospital Incorporated (Respondent).

Unit: "all office and clerical employees of the respondent, South Waterloo Memorial Hospital Incorporated, in the City of Cambridge, Ontario, save and except secretary to the Administrator, secretary to the Assistant Administrator, secretary to the Director of Nursing, secretary to the Director of Finance, Personnel Assistant, Supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during vacation periods and employees covered by existing collective agreements." (74 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		73
Number of persons who cast ballots	68	
Number of spoiled ballots	0	
Number of ballots marked in favour of applicant	39	
Number of ballots marked against applicant	29	

**0269-77-R:** Canadian Chemical Workers' Union (Applicant) v. The Continental Group of Canada Limited, Paper Products Division, Plant 533 – London (Respondent) v. International Chemical Workers Union and its Local 898 (Intervener).

Unit: "all office and clerical employees of Continental Can Company of Canada Limited at London, save and except supervisors, persons above the rank of supervisor, salesmen and sales trainee, plant manager's secretary, industrial nurse, plant buyer, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement between the respondent and the International Chemical Workers Union, Local 186." (15 employees in the unit).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant	11	
Number of ballots marked in favour of intervener	0	

**0270-77-R:** Canadian Chemical Workers' Union (Applicant) v. Mel Hall Transport Ltd. (Respondent) v. International Chemical Workers' Union and its Local 186 (Intervener).

Unit: "all employees working at and out of the Respondent's premises London, Ontario, save and except foreman, those above the rank of foreman and office staff." (20 employees in the unit.) (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		20
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant	8	
Number of ballots marked in favour of intervener	1	

## Applications Certified Subsequent to Post-Hearing Vote

**2026-76-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Ellwood Robinson Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working within the City of Sault Ste. Marie, and within a radius of thirty-five miles of the said City of Sault Ste. Marie City Hall, save and except foremen, persons above the rank of foreman, watchmen, technical and office staff and students hired for the summer vacation period." (42 employees in the unit).

Number of names of persons on revised voters' list		42
Number of persons who cast ballots	42	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	25	
Number of ballots marked in favour of Algoma Construction Workers' Union	16	

**2133-76-R:** Union of Canadian Retail Employees, C.L.C. (Applicant) v. Z and W. Foods Limited (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (115 employees in the unit).



Number of names of persons on list as originally prepared by employer		105
Number of persons who cast ballots	102	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	64	
Number of ballots marked against applicant	35	

**0047-77-R:** Canadian Union of Public Employees (Applicant) v. The Board of Education for the City of Toronto (Respondent).

Unit: "all office and clerical employees of the respondent in its elementary schools who are regularly employed for not more than 24 hours per week save and except supervisors, those above the rank of supervisor and those persons covered by existing collective agreements." (72 employees in the unit).

Number of names of persons on revised voters' list		27
Number of persons who cast ballots	23	
Number of spoiled ballots	0	
Number of ballots marked in favour of applicant	18	
Number of ballots marked against applicant	5	

**0122-77-R:** United Steelworkers of America (Applicant) v. Industrial Cleaning Services (Respondent).

Unit: "all employees of the respondent working in and out of Sudbury, save and except foremen, persons above the rank of foreman, and sales staff." (8 employees in the unit).

Number of names of persons on revised voters' list		7
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	0	

**0128-77-R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The St. Thomas-Elgin General Hospital (Respondent).

Unit: "all employees of The St. Thomas-Elgin General Hospital at St. Thomas regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons employed for the vacation period save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor and office and security staff." (167 employees in the unit).

Number of names of persons on revised voters' list		163
Number of persons who cast ballots	82	
Number of ballots marked in favour of applicant	65	
Number of ballots marked against applicant	17	

**0189-77-R:** The Workers Union of Queen Elizabeth Hospital (C.N.T.U.) (Applicant) v. VS Services Ltd. (Respondent).

Unit: "all employees of the respondent in the Dietary Department at the Runnymede Hospital in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, dietitians, student dietitians, chef, office staff and persons who are regularly employed for not more than twenty-four hours per week." (11 employees in the unit).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots		12
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	3	

## APPLICATIONS FOR CERTIFICATION DISMISSED

### No Vote Conducted

**1500-75-R:** Association of Allied Health Professionals Ontario (Applicant) v. St. Joseph's Hospital, Hamilton (Respondent) v. Canadian Union of Public Employees, Local 786 (Intervener #1) v. Civil Service Association of Ontario (Inc.) (Intervener #2). (49 employees).

**1921-75-R:** Shopmen's Local Union No. 757 of the International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. Dufferin Steel Co. (AWICO DIV.) (Respondent).

**0002-76-R:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local #75 (Applicant) v. Dufferin Steel Co. (AWICO DIV.) (Respondent). (68 employees).

**0647-76-R:** Retail Clerks International Association, Local 409 (Applicant) v. Zalgar Investments Incorporated (Respondent) v. Employee (Objector).

Unit: "all employees of Zalgar Investments Incorporated at Thunder Bay, Ontario, save and except managers, persons above the rank of manager and office staff." (33 employees in the unit). (*Having regard to the agreement of the parties*).

**1300-76-R:** Local 636 of the International Brotherhood of Electrical Workers (Applicant) v. Orillia Water, Light and Power Commission (Respondent).

Unit: "all office and clerical employees of the respondent in Orillia, save and except the secretary to the general manager, supervisors, persons above the rank of supervisor, persons who work less than twenty-four (24) hours per week, students employed during the school vacation period and persons represented under subsisting collective agreements." (10 employees in the unit).

**0379-77-R:** Charterway Employees Association (Applicant) v. Charterways Transportation Limited (respondent). (53 employees).

### Certification Dismissed Subsequent to Post-Hearing Vote

**1851-76-R:** Warehousemen and Miscellaneous Drivers Local Union No. 419 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Home Fireplaces Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Town of Markham, save and except warehouse manager, persons above the rank of warehouse manager, office and sales staff and persons who are regularly employed for not more than twenty-four hours per week." (10 employees in the unit).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	8	

**2151-76-R:** United Brotherhood of Carpenters & Joiners of America (Applicant) v. Alwell Forming (London) Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	10	

**0031-77-R:** Canadian Union of Public Employees (Applicant) v. The Villa Private Hospital Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Town of Vaughan save and except professional medical staff, graduate nurses, under graduate nurses, graduate pharmacists, graduate dietitians, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (79 employees in the unit).

Number of names of persons on list as originally prepared by employer		80
Number of persons who cast ballots	77	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	22	
Number of ballots marked against applicant	54	

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**2120-76-R:** Laborers' International Union of North America, Local 1089 (Applicant) v. Teperman & Son Ltd. (Respondent). (15 employees).

**0230-77-R:** Charterway Employees Association (Applicant) v. Charterways Company Limited (Respondent). (45 employees).

**0280-77-R:** Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Western Dispatch Inc. operating as Western Dispatch Company (Respondent) v. Group of Employees (Objectors). (37 employees).

**0292-77-R:** Lake Ontario District Council on behalf of Locals 397, 572, 1071 and 1450 of The United Brotherhood of Carpenters and Joiners of America (Applicant) v. Eastern Construction Co. Ltd. (Respondent). (2 employees).



**0293-77-R:** Lake Ontario District Council, on behalf of Locals 397, 572, 1071, and 1450 of The United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mitchell Construction Co. (Canada) (Respondent). (5 employees).

**0294-77-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Ferpac Paving Incorporated (Respondent). (6 employees).

**0324-77-R:** The Hotel and Club Employees' Union Local 299 of Hotel and Restaurant Employees' and Bartenders' International Union (Applicant) v. Prince Hotel (Respondent). (61 employees).

**0357-77-R:** Service Employees Union, Local 478 A.F. of L., C.I.O., C.L.C. (Applicant) v. Cochrane Nursing Homes Limited (Respondent). (18 employees).

**0363-77-R:** United Steelworkers of America (Applicant) v. Canadian A. S. E. Limited (Respondent). (132 employees).

**0374-77-R:** United Steelworkers of America (Applicant) v. Canadian A. S. E. Limited (Respondent). (5 employees).

**0399-77-R:** Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 124, Ottawa – Hull (Applicant) v. City Painting Inc. (Respondent). (2 employees).

**0431-77-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Cosmos Construction Ltd. (Respondent). (5 employees).

**0439-77-R:** The Hotel and Club Employees' Union, Local 299 of Hotel and Restaurant Employees' and Bartenders' International Union (Applicant) v. Prince Hotel (Respondent). (71 employees).

**0442-77-R:** United Steelworkers of America (Applicant) v. Alumicor Limited (Respondent). (30 employees).

**0450-77-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Advanced Carpentry Incorporated (Respondent). (7 employees).

**0451-77-R:** The Canadian Union of Public Employees (Applicant) v. The Ottawa Civic Hospital (Respondent). (4 employees).

## **APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS**

**2088-76-R:** Donald Corcoran (Applicant) v. The Graphic Arts International Union, Local 12-L Toronto (Respondent) v. Graphic Centre (Ontario) Inc. (Intervener). (29 employees). (*Dismissed*).

**2103-76-R:** Lloyd J. Pilkey (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local Union 2679 (Respondent) v. T. G. Gale Limited (Intervener). (*Granted*).

Unit: "all employees of T.G. Gale Limited at 284 Ritson Road North, Oshawa, Ontario, save and except office staff, foremen and sales staff." (70 employees in the unit).

Number of names of persons on revised voters' list	-	66
Number of persons who cast ballots	63	
Number of spoiled ballots	2	
Number of ballots marked in favour of Respondent	15	
Number of ballots marked against Respondent	46	

**2104-76-R:** Arthur Retemeyer and Uton Miller (Applicant) v. United Steelworkers of America and its Local 7978 (Respondent) v. Sklar Furniture Limited (Chair Division) (Intervener). (*Granted*).

Unit: "all employees of Sklar Furniture Limited at its Chair Division at Metropolitan Toronto, save and except foremen, persons above the rank of foreman, and office and sales staff." (204 employees in the unit).

Number of names of persons on revised voters' list		186
Number of persons who cast ballots	164	
Number of spoiled ballots	20	
Number of ballots marked in favour of Respondent	23	
Number of ballots marked against Respondent	121	

**2130-76-R:** William Lasruk (Applicant) v. Printing Specialties and Paper Products Union (Respondent) v. CB Packaging Limited (Intervener). (*Granted*).

Unit: "all employees of CB Packaging Limited in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation." (46 employees in the unit).

Number of names of persons on revised voters' list		41
Number of persons who cast ballots	36	
Number of spoiled ballots	2	
Number of ballots marked in favour of Respondent Union	8	
Number of ballots marked against Respondent Union	26	

**2197-76-R:** Association of Librarians of the University of Ottawa (CUPE Local 1956) (Applicant) v. Canadian Union of Public Employees (Respondent). (*Granted*).

Unit: "all employees of the University of Ottawa engaged as professional librarians, save and except supervisors and persons above the rank of supervisor." (43 employees in the unit).

Number of names of persons on revised voters' list		41
Number of persons who cast ballots	33	
Number of ballots marked in favour of Respondent	1	
Number of ballots marked against Respondent	32	

**0171-77-R:** Dale Barclay, Jane Bond, Cherie Carrier, Susan Coghlin, Margaret Greenshields, Marilyn Milner, Ingrid Spencer (Applicants) v. Association of Commercial & Technical Employees, Local 1704, C.L.C. (Respondent). (*Granted*).

Unit: "all office and clerical employees of Cameron, Brewin and Scott working at Metropolitan Toronto, save and except articling law students, members of the legal profession and bookkeeper." (7 employees in the unit).

Number of names of persons on list as originally prepared by employer		9
Number of names of persons who cast ballots	9	
Number of ballots marked in favour of Respondent	0	
Number of marked ballots against Respondent	9	

**0202-77-R:** Grenville Thorne, of the Township of Innisfil, in the County of Simcoe (Applicant) v. Local Union 1739 International Brotherhood of Electrical Workers (Respondent) v. Abercrombie Electric Co. Ltd. (Intervener). (*Terminated*).

Unit: "all wiremen and apprentices on all inside and outside electrical construction work performed by the intervener within the property lines of any construction project in Simcoe County, Muskoka County and the Townships of Humphrey, Conger, Christie, Faley, Cowper, McKellar, McDougall and Hangerman in the District of Parry Sound." (6 employees in the unit).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	5	

**0297-77-R:** Edith Hilts (Applicant) v. Local Union 2345 International Brotherhood of Electrical Workers (Respondent) v. Onward Manufacturing Company Limited (Intervener). (*Granted*).

Unit: "all employees of Onward Manufacturing Company Limited, Kitchener, Ontario, save and except foremen, persons above the rank of foreman and office staff." (84 employees in the unit).

Number of names of persons on list as originally prepared by employer		84
Number of persons who cast ballots	73	
Number of spoiled ballots	3	
Number of ballots marked in favour of Respondent	6	
Number of ballots marked against Respondent	64	

**0337-77-R:** S. J. Pilat Limited Mount Royal I.G.A. (Applicant) v. Retail Clerks Union, Local 206 (Respondent). (17 employees). (*Dismissed*).

**0342-77-R:** Kenneth R. Graham, John Pilletier, David Pratt and James Muise (Applicant) v. Labourers' International Union of North America Local 183 (Respondent) v. High City Holdings Limited (Intervener). (employees). (*Dismissed*).

**0406-77-R:** John Fitzgerald (Applicant) v. United Steelworkers of America (Respondent) v. Wyandotte Chemicals of Canada Ltd. (Intervener). (17 employees). (*Granted*).

## APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

**0215-77-U:** Arthur G. McKee and Company of Canada Limited (Applicant) v. N. Blais, L. Guite et al (See Schedule A, B and C attached hereto) (Respondents). (*Withdrawn*).



**0288-77-U:** Fabricated Steel Products (Windsor) Limited (Applicant) v. Gerard A. LaBelle, Ernest G. Fryer, Albert Colombe et al (See Schedule "A" attached) (Respondent). (*Granted*).

**0365-77-U:** Livingston Industries Limited (Applicant) v. International Woodworkers of America, K. M. Winkworth on behalf of the Union and on his own behalf and those persons in Schedule "A" attached hereto (Respondents). (*Withdrawn*).

**0366-77-U:** Operative Plasterers' & Cement Masons' International Association, Local 172 (Applicant) v. Labourers' International Union of North America, Local 506 (Respondent). (*Withdrawn*).

**0382-77-U:** The Wood, Wire & Metal Lathers' International Union, Local 562 (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 38, Arthur J. Varty and Larry Beaudoin (Respondents). (*Granted*).

**0383-77-U:** Canadian General Electric Company Limited (Applicant) v. Wayne Eriksen, et al (See attached Schedule) (Respondents). (*Withdrawn*).

**0385-77-U:** Canadian General Electric Company Limited (Applicant) v. Wayne Eriksen, et al (See attached Schedule) (Respondents). (*Withdrawn*).

## APPLICATIONS FOR DECLARATIONS THAT LOCK-OUT UNLAWFUL

**2011-76-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local 141 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Canadian Building Materials Company (Respondent). (*Dismissed*).

**0454-77-U:** Ontario Nurses' Association (Applicant) v. The Downtown Convalescent Centre (Respondent). (*Terminated*).

## APPLICATIONS FOR CONSENT TO PROSECUTE

**0130-77-U:** Labourers' International Union of North America, Local 183 (Applicant) v. Centrac Industries Limited (Respondent). (*Withdrawn*).

**0163-77-U:** Retail Clerks Union, Local 206 chartered by Retail Clerks International Association (Applicant) v. G. Tamblyn Limited (Respondent). (*Withdrawn*).

**0266-77-U:** The Lummus Company Canada Limited (Applicant) v. Don Paquette et al (Respondents). (*Withdrawn*).

**0291-77-U:** Fabricated Steel Products (Windsor) Limited (Applicant) v. Gerard A. LaBelle, Ernest G. Fryer, Albert Colombe et al (See Schedule "A" Attached) (Respondents). (*Withdrawn*).

**0351-77-U:** Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 165, Norman F. Cook and Ralph Brown (Respondents). (*Withdrawn*).

**0384-77-U:** Canadian General Electric Company Limited (Applicant) v. Wayne Eriksen, et al (See attached Schedule) (Respondent). (*Withdrawn*).

**0409-77-U:** International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. A. V. Hallam Lathing & Plastering Ltd. (Respondent). (*Withdrawn*).

## COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

**0646-76-U:** Keith Sutherland (Complainant) v. The Ontario Municipal Employees Retirement Board (Respondent) v. Canadian Union of Public Employees, Local 1923 (Intervener). (*Dismissed*).

**1007-76-U:** J. Gary Provost (Complainant) v. Local Union 211, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Respondent) v. Daniel International (Canada) Limited (Intervener). (*Withdrawn*).

**1008-76-U:** Robert J. Grigg (Complainant) v. Local Union 211, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Respondent) v. Daniel International (Canada) Limited (Intervener). (*Withdrawn*).

**1691-76-U:** Canadian Food and Allied Workers Local 725, chartered by Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C. (Complainant) v. S. S. Kresge Company Limited (Respondent). (*Withdrawn*).

**1723-76-U:** Ontario Housing Employees Local 76, Canadian Union of Public Employees, O.F.L., C.L.C. (Complainant) v. Treal Building Maintenance Ltd. (Respondent). (*Dismissed*).

**1863-76-U:** Boot and Shoe Workers Union (Complainant) v. Hillsdale Nursing Home (Respondent). (*Granted*).

**1943-76-U:** Hotel Restaurant Employees and Bartenders International Union Local 604 AFL.CIO.CLC. (Complainant) v. Benson Hotel, 24 Kent St. West, Lindsay, Ont. (Respondent). (*Granted*).

**2029-76-U:** Canadian Union of Public Employees and its Local 109 (Complainant) v. The Corporation of the City of Kingston (Respondent). (*Withdrawn*).

**2081-76-U:** The Ottawa Newspaper Guild, Local 205, The Ottawa Typographical Union, Local 102, The Ottawa W.E.B. Newspaper Press Men's Union #62, The Ottawa Stereotypers and Electrotypers Union #50, and The Ottawa Mailers' Union #60 (Complainants) v. The Journal Publishing Company of Ottawa Limited and L.A. Lalonde (Respondents).

- and -

**0041-77-U:** The Ottawa Newspaper Guild, Local 205, The Ottawa Typographical Union, Local 102, The Ottawa W.E.B. Newspaper Press Men's Union #62, The Ottawa Stereotypers and Electrotypers Union #50, and The Ottawa Mailers Union #60 (Complainants) v. The Journal Publishing Company of Ottawa Limited (Respondents).

**0048-77-U:** The Journal Publishing Company of Ottawa Limited (Complainant) v. The Ottawa Newspaper Guild, Local 205, The Ottawa Typographical Union, Local 102, The Ottawa W.E.B. Newspaper Press Men's Union #62, The Ottawa Stereotypers and Electrotypers Union #50, and The Ottawa Mailers' Union #60 (Respondents). (*Granted*).

**2178-76-U:** Martin Vander Velden (Complainant) v. Heat & Frost Insulators & Asbestos Workers – Local 95 (Respondent). (*Dismissed*).

**0013-77-U:** Christian Labour Association of Canada (Complainant) v. Local 593 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada et al (See attached Schedule "A") (Respondents). (*Granted*).

**0050-77-U:** United Brotherhood of Carpenters and Joiners of America Local 93 (Complainant) v. J. C. Sulphur Construction Ltd. (Respondent). (*Withdrawn*).

**0053-77-U:** Toronto Typographical Union No. 91 (Complainant) v. C C H Canadian Limited (Respondent). (*Terminated*).

**0069-77-U:** Canadian Union of Public Employees (Complainant) v. Guelph Public Library Board (Respondent). (*Withdrawn*).

**0070-77-U:** Stanko Milardovic (Complainant) v. John Sukmonowski, Fred Orders and United Auto Workers, Local 199 of General Motors of Canada (Respondents) v. General Motors of Canada Limited (Intervener). (*Dismissed*).

**0097-77-U:** Retail Clerks Union, Local 206 (Complainant) v. V. S. Services Limited (Respondent). (*Granted*).

**0185-77-U:** United Steelworkers of America (Complainant) v. Kodak Canada Ltd. (Respondent). (*Withdrawn*).

**0301-77-U:** Warehousemen and Miscellaneous Drivers Union Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Oil & Gas Technicians, Service, Domestic and General Workers Union Local 1267, L.I.U.N.A. (Respondent). (*Withdrawn*).

**0303-77-U:** Warehousemen and Miscellaneous Drivers Union Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Oil & Gas Technicians, Service, Domestic and General Workers Union Local 1267, L.I.U.N.A. (Respondent). (*Withdrawn*).

**0304-77-U:** Warehousemen and Miscellaneous Drivers Union Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Oil & Gas Technicians, Service, Domestic and General Workers Union Local 1267, L.I.U.N.A. (Respondent). (*Withdrawn*).

**0326-77-U:** United Steelworkers of America (Complainant) v. Jet Welding and Ornamental Iron Works Inc. (Respondent). (*Granted*).



**0336-77-U:** Calvin Golbeck (Complainant) v. Sheet Metal Workers' International Ass'n. Local Union No. 562 (Respondent). (*Withdrawn*).

**0343-77-U:** Local Union #834 of the International Association of Bridge Structural and Ornamental Iron Workers (Complainant) v. Frankel Structural Steel Limited (Respondent). (*Dismissed*).

**0345-77-U:** International Woodworkers of America (Complainant) v. Don Valley Lumber Company, A Division of Salmill Building Supplies Limited (Respondent). (*Withdrawn*).

**0347-77-U:** Mr. Clinton Reid (Complainant) v. Capital Paving Limited (Respondent). (*Withdrawn*).

**0352-77-U:** Labourers' International Union of North America, Local 183 (Complainant) v. York Condominium Corporation No. 165, Norman F. Cook and Ralph Brown (Respondents). (*Withdrawn*).

**0354-77-U:** Ontario Slack Manufacturers Association (Complainant) v. Amalgamated Clothing and Textile Workers Union Toronto Joint Board (Respondent). (*Withdrawn*).

**0402-77-U:** Noel McDonald and James Moffat (Complainants) v. Sheet Metal Workers' International Association, Local Union No. 30, Ernie Ferguson, James McKinnon and Mahon Industrial Corp. (Respondents). (*Withdrawn*).

**0403-77-U:** Ontario Nurses' Association (Complainant) v. St. Joseph's Hospital, Brantford, Ontario (Respondent). (*Withdrawn*).

**0421-77-U:** Croven Limited (Complainant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW and its Local 1090 (Respondent). (*Withdrawn*).

**0425-77-U:** United Steelworkers of America (Complainant) v. Jutras Die Casting Limited (Respondent). (*Withdrawn*).

## APPLICATION UNDER SECTION 55

**0311-77-R:** International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Richmond Inn Ltd., Known as: Richmond Inn Motor Hotel (Successor) v. A. & A. Hotels Limited, Known as: Richmond Inn Motor Hotel (Predecessor). (*Granted*).

## JURISDICTIONAL DISPUTES

**0718-76-JD:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787 (Complainant) v. J.R. Seguin et Fils Limited and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 71 (Respondents) v. The Mechanical Contractors Association of Ottawa (Intervener #1) v. Canadian Automatic Sprinkler Association and Mechanical Contractors Association of Ottawa (Intervener #2). (*Granted*).

**2114-76-JD:** B. N. Tile & Terrazzo Co. Ltd. (Complainant) v. United Brotherhood of Carpenters and Joiners of America, Local 2486 and Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 28 and Acme Building and Construction Limited and Acme-Lansdowne/Joint Venture (Respondents). (*Granted*).

## APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

**1418-76-M:** The Canadian Union of Public Employees and its Local 1197 (Applicant) v. The Dufferin County Board of Education (Respondent). (*Withdrawn*).

**1946-76-M:** Ready-Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, Teamsters Local Union No. 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. E. S. F. Limited (Respondent). (*Granted*).

## REFERENCES TO BOARD PURSUANT TO SECTION 96

**0035-77-M:** Industrial Wire & Cable Company (Employer) v. United Steelworkers of America, Local 7608 (Trade Union). (*Granted*).

**0348-77-M:** Al-Mar Nursing Home (formerly Orillia Nursing Home) (Employer) v. Service Employees Union, Local 204 AFL-CIO-CLC (Trade Union). (*Terminated*).

## APPLICATIONS UNDER SECTION 112A

**1371-76-M:** Teamsters Local Union, No. 879 (Applicant) v. King Paving and Materials, Division of Flintkote Company of Canada Limited (Respondent). (*Dismissed*).

**1652-76-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Arlington Crane Service Limited (Respondent). (*Dismissed*).

**1812-76-M:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Acme Building and Construction Limited (Respondent) v. Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Intervener). (*Withdrawn*).

**1843-76-M:** International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Electrical Contractors' Association of Toronto and J.A.K. Electrical Contractors Limited (Respondent). (*Granted*).

**2183-76-M:** The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Andco Anderson Limited and The Masonry Industry Employers Council of Ontario (Respondents). (*Granted*).

**2190-76-M:** International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Electrical Contractors' Association of Toronto and Benda Electric and Construction Limited (Respondent). (*Withdrawn*).

**0110-77-M:** Lake Ontario District Council, on behalf of Locals 397, 572, 1071, 1450 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Oshawa Forming Limited (Respondent). (*Withdrawn*).

**0112-77-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Earl Jones and Sons (Respondent). (*Withdrawn*).

**0169-77-M:** Teamsters Local No. 679 (Applicant) v. 354278 Ontario Limited (Respondent).

**0254-77-M:** Refrigeration Installation and Service Mechanics and Apprentices of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local 787 (Applicant) v. Advanced Cooling Systems Inc. (Respondent).

**0255-77-M:** Refrigeration Installation and Service Mechanics and Apprentices of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local 787 (Applicant) v. Advanced Cooling Systems Inc. (Respondent). (*Terminated*).

**0263-77-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Jen-Dan Limited (Respondent). (*Withdrawn*).

**0340-77-M:** The International Brotherhood of Painters and Allied Trades Local 1824 Glaziers and Metal Mechanics (Applicant) v. Kitchener Glass Ltd. (Respondent). (*Withdrawn*).

**0378-77-M:** International Brotherhood of Painters and Allied Trades (Applicant) v. Soo Painting Limited (Respondent). (*Withdrawn*).

**0389-77-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Schwenger Construction Limited (Respondent). (*Dismissed*).

**0445-77-M:** United Brotherhood of Carpenters and Joiners of America, Local 249, Kingston, Ontario (Applicant) v. Leader Structures (Ottawa) Limited (Respondent). (*Withdrawn*).

**0446-77-M:** Sheet Metal Workers' International Association, Local Union 285 (Applicant) v. Robert Bratti & Associates Ltd. Residential Sheet Metal Contractors Organization (Respondents). (*Withdrawn*).

**0468-77-M:** Labourers' International Union of North America, Local 183 (Applicant) v. The Utility Contractors' Association of Ontario and Pemrow Pipelines Construction Co. Ltd. (Respondents). (*Withdrawn*).



## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**1287-75-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local 880 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. H. O. Trerice Co. (Respondent). (*Request Denied*).

**1518-76-R:** Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Silverwood Dairies, Division of Silverwood Industries Limited (Respondent) v. Office & Professional Employees International Union, Local 743 (Intervener). (*Request Denied*).

**0168-77-R:** United Textile Workers of America (Applicant) v. Collie Woollen Mills Limited, Perth Division (Respondent) v. Group of Employees (Objectors). (*Request Denied*).

**1568-76-U:** Libby, McNeill & Libby of Canada, Limited (Applicant) v. United Automobile, Aerospace & Agriculture Implement Workers of America and others as listed on attached page (Respondents). (*Request Denied*).

# ONTARIO LABOUR RELATIONS BOARD

## Monthly Case Breakdown—Disposition and Comparison for June 1977 (fiscal year 1977-78)

Case Type	Applications Received		Total Disposed of		Disposed of During: June			Pending	Disposed of Last Month		
	During: June	Last Month	During: June	Last Month	Granted	Dismissed	Withdrawn		Granted	Dismissed	Withdrawn
Certification	90	74	93	104	64	12	17	202	76	12	16
Termination	9	6	11	6	8	3	-	15	2	1	3
Section 1(4)	2	1	-	-	-	-	-	10	-	-	-
*Successor Status	5	3	1	2	-	-	1	17	-	1	1
Accreditation	-	-	-	1	-	-	-	7	1	-	-
Unlawful Strike	1	1	2	-	1	-	1	30	-	-	-
Unlawful Lockout	1	1	-	-	-	-	-	4	-	-	-
Prosecutions	6	11	7	4	-	-	7	112	-	-	4
Section 79	33	36	28	28	6	4	18	178	-	3	25
**Declaration of Unlawful Strike or Lockout	6	11	4	12	-	-	4	63	1	4	7
***Misc.	32	22	17	18	-	2	15	190	4	1	13
Bill 139	1	-	1	-	-	-	1	0	-	-	-
TOTAL	186	166	164	175	79	21	64	828	84	22	69
											806

\*Sections 54 and 55 are consolidated.

\*\*Sections 123, 82, 83 and 63 are consolidated.

\*\*\*Sections 37, 39, 44(3), 76, 81, 95(2), 96 and 112(a) are consolidated.

NOTE: The Pending figures found directly beside the section "Disposed of During: \_\_\_\_\_" are a consolidation of those cases received during the month and pending into the next, and the pending cases from the previous month.









2001-2002

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